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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ———

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MYRTLE GROVE PACKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 12, 1955.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82–85; App. A, *infra*, 17–21) are reported at 117 F. Supp. 599. The *per curiam* opinion of the Court of Appeals (App. A, 22) is reported at 217 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals (App. A, 22) was entered on January 12, 1955. The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in Appendix B, *infra,* pp. 35–36.

QUESTION PRESENTED

Whether employees who remove the shell from seafoods as an integrated step in the continuous and uninterrupted process of canning these products are employed in "canning," which Section 13 (b) (4) of the Fair Labor Standards Act exempts from the overtime but not the minimum wage provisions, or are employed in "processing (other than canning)", which Section 13 (a) (5) exempts from both the minimum wage and overtime provisions of the Act.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the minimum wage and record-keeping provisions of the Act. The respondent is almost exclusively engaged in the business of canning shrimp and oysters for interstate commerce. The employees concerned peel the shrimp and shuck the oysters as an integrated step in the continuous canning process.

The parties stipulated and the district court found that sales of canned shrimp and oysters amounted to $930,356.34 and constituted 97.67% of respondent's total sales (R. 28, 83; Fdg. 1) during a period from January 1, 1951, to September 30, 1952, which the court found was "typical" of "respondent's operations and practices" (R. 27, 83; Fdg. 1), and that "Substantially all of the shrimp and oysters handled (approximately 95%)" are being produced for interstate commerce (R. 26, 83; Fdg. 1).[1]

The integration of the peeling and shucking operations with the canning process is evident from the trial court's findings. The court found that "the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours" (R. 84; Fdg. 14); and that "the entire handling of oysters" from "the beginning of the steaming process to the completion of the final sterilization of the hermetically sealed cans requires only about two hours" (R. 83; Fdg. 7). Once the canning of the shrimp or oysters is begun they are not held at any step except to accumulate a sufficient

[1] In only one of the seven quarterly periods included in the stipulation did the respondent sell any shrimp or oysters processed by a method other than canning, and such sales amounted to $7,569.05, or only 0.8 of 1%, of the respondent's total sales. The balance of respondent's sales, 1.53% of the total, consisted of shrimp and oysters sold in the shell with no processing whatever. (R. 28.)

quantity to begin the next step (R. 84; Fdgs. 8, 15).

The first step in the canning of oysters is to cook them partially by steaming in retorts for five to ten minutes (R. 83; Fdg. 3). "Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved" (R. 83; Fdg. 4). After a shucker weighs the oysters he has shucked to determine his piece rate earnings, they are dumped into a tub for washing (R. 83; Fdg. 4) and then floated into another room where they are inspected, placed in a brine tank, and reinspected (R. 83; Fdg. 5). The oysters are then carried to the "packing room" where they are placed in cans, sealed, and subjected to further heat treatment (R. 83; Fdg. 6). The court found that it was the "defendant's [respondent's] desire and it attempts to make the handling of the oysters in the manner above set forth a continuous process" (R. 84; Fdg. 8).

Shrimp are canned in accordance with a very similar procedure. They "are first dumped, raw, on a table where the employees here involved remove the edible portions" (R. 84; Fdg. 10).[2] They are then floated in flumes to an inspection belt, inspected, and cooked in a blanching tank (R. 84; Fdg. 11). After reinspection and grad-

[2] The piece rate earnings of these employees are determined by weighing the inedible portions which they have removed (R. 84; Fdg. 12).

ing for size, they are carried to the packing room where they are placed in cans, sealed and heat treated (R. 84; Fdg. 13). The court found that "It is the desire of the [respondent] and every effort is expended to make the process a continuous one" (R. 84; Fdg. 15).

The testimony of the respondent's vice president emphasized the complete integration between the preparatory work performed by the employees herein and the actual putting into cans. He testified that "for all practical purposes" respondent Myrtle Grove had "done nothing but can" the shrimp and oysters it handled (R. 47) since it was opened in 1946 or 1947 (R. 50) and had not to his knowledge canned "shrimp or oysters that were shelled or picked somewhere else" (R. 48).

Prior to the enactment of the Fair Labor Standards Amendments of 1949, Section 13 (a) (5) exempted from both the wage and hour requirements of the Act any employee employed in "processing, marketing, freezing, *canning,* curing, storing or distributing" any "aquatic forms of animal and vegetable life" (emphasis added).

The 1949 amendments deleted the word "canning" from this list of activities and qualified "processing" by the insertion of the parenthetical phrase "(other than canning)" so that it now reads "processing (other than canning)." At the same time, a new subsection numbered 13 (b) (4) was added, providing an exemption from the

overtime compensation provision, *but not from the minimum wage,* for the "canning of any kind of fish, shellfish," etc.

The district court held that the broader exemption of Section 13 (a) (5) applies and dismissed the complaint, on the sole ground that "Independent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in *Donnely* v. *Mavar Shrimp & Oyster Co.,* 190 F. 2d 409." The court of appeals affirmed *per curiam* without opinion (App. A, 22), citing only its decision in the *Donnely* case (App. A, 23–34).

Donnely v. *Mavar Shrimp & Oyster Co.* was a declaratory judgment action instituted ostensibly by employees. The majority opinion of the Fifth Circuit there held that the picking of shrimp and shucking of oysters are processes "separable" from canning and are exempt from both the minimum wage and overtime requirements as "processing (other than canning)" under Section 13 (a) (5) (190 F. 2d at 411; App. A, *infra,* 25). As pointed out in the dissenting opinion, the Government was not a party to that action and there were indications that it was a "friendly suit" between parties who "desired the same result" (*id.* at 412–414; App. A, 29). The parties had in effect stipulated the very issue in controversy in the instant case by agreeing that none of the employees involved were "engaged in the canning of sea foods or aquatic

products," and that the picking of shrimp and shucking of oysters "are separate, distinct, and have no immediate relationship" to the canning (*id.* at 413; App. A, 30).

REASONS FOR GRANTING THE WRIT

The decision below conflicts squarely with the decision of the Court of Appeals for the Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245. We believe that the clear legislative purpose of the exemptions involved as well as the settled principles established by this Court for construing all exemptions from the Fair Labor Standards Act demonstrate the error of the court below. In any event, the conflict between the Fourth and Fifth Circuits, affecting the applicability of the Act's minimum wage provisions to a large proportion of the employees in the fish canning industry, should be resolved by this Court.

1. Except for the fact that the employees in the instant case are engaged in peeling shrimp and shucking oysters while those in *Tobin* v. *Blue Channel Corp., supra,* pick the meat from the claws of crabs, the cases are virtually identical. If there is any factual distinction, the situation here makes it even clearer that shelling the seafood is an integral part of "canning." In this case, the district court found that the preparatory work was performed almost exclusively for canning (R. 28, 83; Fdg. 1); in the *Blue Channel* case the preliminary operations were also performed to

fill "substantial orders for fresh and frozen crabmeat" (198 F. 2d at 247).

The Fourth Circuit in *Blue Channel*, by unanimous decision, held that the claw pickers were engaged in "canning" within Section 13 (b) (4) and thus entitled to the minimum wage protection. The court reasoned that the employer's main objective is canning, which is accomplished by "a continuous series of operations," and that "extracting the crabmeat from the claw, is an early and preparatory, but nonetheless an essential and integrated, step in the continuous and uninterrupted process of canning crabmeat" (198 F. 2d at 248). It concluded that it could not "view the necessary preparatory operations of the claw pickers in picking and sorting the crabmeat in isolation from the canning process as a whole." *Ibid.*

The Fifth Circuit in the decision below, and in the *Donnely case* (by a divided court), reached exactly the opposite result, despite the express recognition in the majority opinion in *Donnely* that "canning" includes, in addition to hermetically sealing, "every other operation necessarily performed on the products before they are placed in cans, bottles, or other containers" (190 F. 2d at 411; App. A, 25).

The *Blue Channel* case was decided subsequent to the *Donnely* decision and expressly declined to follow the majority opinion in *Donnely*, although pointing out that the cases might pos-

sibly be distinguished on the ground of the apparently "friendly" nature of the action and the stipulation in *Donnely* (198 F. 2d at 247–248). The instant case was then instituted by the Secretary of Labor in a district court in the Fifth Circuit in an effort to bring about conformity of enforcement. But the Court of Appeals, rejecting the suggestion that *Donnely* might be distinguished because of the manner in which it was presented, held that decision decisive of the instant case. Since this case is not distinguishable from *Blue Channel*, a direct conflict is now presented.

2. The decision below is incorrect. It is contrary to the plain meaning and express legislative purpose of the exemptions; and it is also inconsistent with the well settled principles established by this Court's decisions for construing exemptions from this Act.

(a) The obvious design of the 1949 Amendments in changing Section 13 (a) (5) and adding Section 13 (b) (4) was to extend the minimum wage benefits of the Act, but not the overtime provisions, to workers in the fishery and seafood industry employed in "canning."

The 1949 amendment to Section 13 (a) (5) deleted the word "canning" from its list of exempt activities. To make it unmistakably clear that the complete exemption would no longer apply to canning, the generic word "processing" was expressly qualified by the insertion

of a parenthetical phrase which can have had no purpose other than to preclude its extension to anything properly included in the term "canning." The amended phrase now reads "processing (other than canning), marketing, freezing, curing, storing, or distributing." At the same time, the new section numbered 13 (b) (4) was added, exempting "canning" from the Act's overtime provisions but not from the minimum wage requirements.

The meaning and effect of these amendments, insofar as concerns the preparatory operations here involved, was clearly and specifically stated in the legislative reports. Both the form and substance of the Section 13 (a) (5) and Section 13 (b) (4) exemptions were the work of the Conference Committee which expressly explained that "canning" includes *"necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers."* 95 Cong. Rec. 14932–33. (Emphasis added.)

As originally adopted by the House of Representatives and the Senate, the amendments had differed in their treatment of fish canning. The Senate amendment made no change in the 1938 Act in this particular. The House bill provided a 14-workweek exemption for any industry engaged in the first processing or canning of fish in the raw or natural state. The bills adopted by each House were referred to a conference committee to reconcile the differences (95 Cong.

Rec. 14932). The compromise bill as agreed on by this committee was adopted and enacted into law. The unanimous report of the House conferees, explaining this bill to the House of Representatives before it was adopted by that body, said with respect to the activities embraced in the word "canning":

> * * * Under the conference agreement "canning" means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. *It also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers.* Also included are subsequent operations such as the labeling of the cans or other containers and the placing of the sealed containers in cases or boxes whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. [95 Cong. Rec. 14932–33; emphasis added.]

The same description of "canning" appears in the Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874 at 14878).

The Fourth Circuit was thus plainly correct in ruling that shelling, peeling and picking operations are such "necessary preparatory operations" when, as here, "canning is the main ob-

jective * * * and * * * is accomplished by a continuous series of operations * * *" (*Blue Channel,* 198 F. 2d at 248). The court below itself expressly recognized the Congressional intent to include in the term "canning" "every operation necessarily performed on the products before they are placed in cans" (*Donnely* opinion, 190 F. 2d at 411, App. A, 25). Its exclusion, nonetheless, of picking and shucking operations seems to rest solely on its erroneous assumption that "processing (other than canning)" in Section 13 (a) (5) would be meaningless if not construed to embrace picking and shucking. But, as pointed out by the Fourth Circuit in *Blue Channel:* "Certainly, scores of situations could be mentioned in which products are processed but not canned" (198 F. 2d at 248).[3]

[3] The exemption for "processing (other than canning)" has substantial practical meaning and ample scope for operation apart from the preparatory operations preceding canning. The production of oil and meal from menhaden and other fish, and the filleting of fresh fish, are ready examples of very substantial practical importance. "Practically the entire 1951 menhaden production was used in the manufacture of oil and meal." *Fishery Statistics of the United States 1951,* Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., p. 289. Neither the extracting and rendering of oil from the fish nor the filleting of fresh fish is included in the specifically mentioned operations—other than "processing"—exempt under Section 13 (a) (5). Furthermore, the terms of the exemption itself show that it applies to many products which are processed in ways not involving freezing, curing, storing or canning. Its terms embrace not only fish, but also "sponges, seaweeds, or other aquatic forms of animal and vegetable

(b) The decision below gives the broadest possible scope to the complete exemption of Section 13 (a) (5), and construes as narrowly as possible the language of Section 13 (b) (4), which was enacted to extend the coverage of the minimum wage provisions of the Act. As the Fourth Circuit said of the latter provision in *Blue Channel:* "We are here dealing with a remedial statute. Its terms of coverage should therefore, be liberally rather than narrowly construed." 198 F. 2d at 248. The Fifth Circuit's approach is diametrically opposed to this Court's repeated and consistent rulings that "[*a*]*ny* exemption from such humanitarian and remedial legislation must * * * be narrowly construed." (Emphasis added.) (*Phillips Co.* v. *Walling,* 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 617; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517).

3. The above conflicts and inconsistencies are of substantial importance to a fair and uniform

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life." Thus, the general word "processing" may apply to such activities as the drying of seaweed preparatory to the manufacture of agar and to the drying and cleaning of sponges.

It is thus seen that the processes applied to the materials mentioned in Section 13 (a) (5) are many and varied. The reasonable construction, therefore, of the word "processing", as used there, would seem to include all of such processes, though not specifically named, except the process of canning, which has been specifically excluded. This interpretation gives the word "processing" the meaning which context and legislative history require, without distorting the ordinary realistic meaning of the term "canning."

enforcement of the Act, inasmuch as some 75 to 90% of the production workers in shrimp and oyster canning plants are employed in these necessary preparatory operations, according to a study made by the Department of Labor.[4] A large proportion of such plants are located in the Fifth Circuit. Thus, unless and until the issue is settled by this Court, numerous workers in canning plants in the Fifth Circuit will be denied the minimum wage benefits of the Act and shell fish canneries located in this Circuit will have a substantial competitive advantage over those located in the adjoining Fourth Circuit.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor, Department of Labor.

APRIL 1955.

[4] *Shrimp and Oyster Canning in the Gulf Area*, Wage and Hour and Public Contracts Divisions of the United States Department of Labor, Feb. 1951, unpublished.

APPENDICES

337691—55——3

APPENDIX A

United States District Court, E. D. Louisiana, New Orleans Division

Jan. 13, 1954

MITCHELL, SECRETARY OF LABOR

v.

MYRTLE GROVE PACKING COMPANY

Civ. A. No. 3392

WRIGHT, *District Judge:* This proceeding was instituted by the Secretary of Labor to require compliance by the defendant with the requirements of the Fair Labor Standards Act of 1938, as amended, in its employment of individuals in the shucking of oysters and the heading and picking of shrimp. The question presented is whether the individuals concerned are engaged in the canning of shrimp and oysters within the contemplation of the Act. The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due deliberation having been had, the court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. The court adopts the stipulation of the parties filed in this cause as findings of fact and makes the further and additional findings based upon the oral testimony adduced at the trial.

2. Oysters canned by the defendant are purchased from fishermen and delivered to the defendant at its dock. Normally, a sufficient quantity is received immediately to begin their handling but if not, oysters may be held one or two days before any processing is begun so that a sufficient quantity for economical handling may be amassed.

3. The first step in the handling of oysters is the placing of them in retorts where they are steamed at temperatures of from 220 to 240 degrees Fahrenheit for periods varying from five to ten minutes, the temperature and time depending upon the size, etc., of the particular batch of oysters. Such steaming constitutes a partial cooking thereof, and is used only when the oysters are to be canned.

4. Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved. As the meat is removed from the shell, it is placed in 25 pound cans by the oyster shellers, weighed to determine the piece rate earnings due such shuckers and then dumped into a tub for washing.

5. After being washed the oysters are "floated" in a water-filled flume into another room where they are inspected. After inspection they are placed in a tank with a brine solution and then are reinspected.

6. Following the last inspection, the oysters are then placed on trays and carried to what is described by defendant as the "packing room", where they are placed in cans. The cans are sealed by machinery and are then subjected to

further heat treatment at about 120 degrees Centigrade for approximately 13 minutes.

7. Normally, the entire handling of oysters as above set forth, from the beginning of the steaming process to the completion of the final sterilization of the hermetically sealed cans requires only about two hours.

8. After the steaming process is begun oysters are not held at any point for a longer period than required to amass a sufficient quantity to justify the placing of an additional crew to work at the next step in their handling. It is the defendant's desire and it attempts to make the handling of the oysters in the manner above set forth a continuous process.

9. As with oysters, shrimp are delivered to the defendant's dock by fishermen. Also, as with oysters, if a sufficient quantity is not delivered the shrimp may be held a few days under refrigeration pending the receipt of a sufficient quantity to permit economical handling.

10. When the defendant is ready to begin the handling of the shrimp they are first dumped, raw, on a table where the employees here involved remove the edible portions of the shrimp.

11. After the shrimp are peeled they are floated in flumes, and simultaneously washed, to an inspection belt. After inspection they are placed in 10 pound containers and placed in a blanching tank and cooked for approximately three minutes. They are then reinspected and graded for size.

12. The inedible portions of the shrimp are placed in large containers by the employees removing them and such containers are weighed to

determine the piece rate earnings of such employees.

13. After being graded, as set out above, the shrimp are placed in trays and carried to what is designated by the defendant as its "packing room." The shrimp are then placed in cans by hand, weighed, and the cans are sealed by machinery and then subjected to a further treatment by heat for approximately 13 minutes at about 120 degrees Centigrade.

14. Normally, the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours.

15. As with the oysters, after the handling of the shrimp is once begun they are not ordinarily held except at the completion of a given step they may be held for a short period while a sufficient quantity is being amassed to justify the calling in of a crew of workers to begin the next step in their handling. It is the desire of the defendant and every effort is expended to make the process a continuous one.

Conclusions of Law

1. The court has jurisdiction of this action.

2. Independent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409. The facts of this case are substantially indistinguishable from the facts in the *Mavar* case. It is true that the stipulation in the *Mavar* case, apparently a so-called friendly suit, goes further in favor of the defendant than the

stipulation in the case at bar. Where it does, however, it relates to questions of law which would not, of course be controlling on the court. Consequently, in resolving the issue of coverage here, the difference in the stipulations may be disregarded.

Judgment for defendant.

United States Court of Appeals for the Fifth Circuit

No. 15051

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

MYRTLE GROVE PACKING COMPANY, APPELLEE

On Appeal From the United States District Court for the Eastern District of Louisiana

January 12, 1955

PER CURIAM: Affirmed. *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409.

United States Court of Appeals for the Fifth Circuit

No. 13419

July 17, 1951

DONNELY ET AL. *v.* MAVAR SHRIMP & OYSTER CO., ET AL.

Appeal from the United States District Court for the Southern District of Mississippi

Before HOLMES, BORAH and RIVES, *Circuit Judges.* HOLMES, *Circuit Judge.*

This action is brought under the Declaratory Judgments Act, as amended, which is contained in Chapter 151 of the Federal Judicial Code of 1948, as amended by the Act of May 24, 1949. See Title 28 of U. S. Code, Sections 2201 and 2202. Federal jurisdiction is based solely on diversity of citizenship, and the amount involved exceeds $3,000 exclusive of interest and costs. This appeal is from a judgment declaring the rights and legal relations of the parties under Section 213 (a) (5) of Title 29 United States Code.

The Declaratory Judgments Act is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction; it should be given a liberal construction. The procedure is expressly recognized in Fed. Rules Civ. Proc. rule 57, 28 U. S.

C. A., which says that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate; also that the court may order a speedy hearing of an action for declaratory judgment, and may advance it on the calendar. See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* 5 Cir., 137 F. 2d 176, affirmed in 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949; *Gully* v. *Interstate Natural Gas Co.,* 5 Cir., 82 F. 2d 145; *Mississippi Power & Light Co.* v. *City of Jackson,* 5 Cir., 116 F. 2d 924; Borchard, Declaratory Judgments, pp. 619–621.

We have no doubt that this case involves an actual justiciable controversy, which in the interest of justice should be speedily heard and determined in accordance with the letter and spirit of the just cited rule. Delay in adjudicating this controversy might be financially disastrous to many small operators in the shrimp and oyster industry. Said Section 213 (a) (5), as amended, exempts from the minimum wages and maximum hours provisions of the Act any employee engaged in the catching or cultivating of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life, including packing of such products for shipment, "processing (other than canning)", marketing, freezing, curing, storing or distributing, the above products, or byproducts thereof. The word processing, as used in the exempting clause, includes a series of acts, events, and occurrences, which are necessary to transform raw seafood into an edible commercial product. The statute excludes from the minimum wages and maximum hours provisions of

the Act every one of the acts and progressive steps, except canning, included in the term processing.

Canning includes hermetically sealing, and sterilizing or pasteurizing, and every other operation necessarily performed on the products before they are placed in cans, bottles, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers; also included are subsequent operations such as the labeling of the cans or other containers, and the placing of the sealed containers in cases or boxes, whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. Every other act or step in catching, curing, marketing, and distributing aquatic products is embraced in the exemption clause except only those especially performed upon the products for the purpose of canning. All the preparatory things are excluded from the act that can be and are done when canning is not intended or contemplated; and all the subsequent operations are excluded, as a matter of course, when canning has not actually taken place. Catching, freezing, curing, shelling, or shucking, shrimp or oysters, constitutes no part of the canning process. Corn is sometimes shucked in the field, and pecans are often shelled without canning. Wringing its neck and plucking its feathers are primary but separable processes in cooking a chicken, and all three are processes other than canning. The primary processes in the silk industry are performed in Asia, and the partially processed silk product is by law imported, duty free, into the United States. Gin-

ning is the primary process in the cotton textile industry, but a cotton gin is distinguishable from a textile mill. A corn shucker is not a miller, and a shrimp picker is not engaged in canning shrimp any more than a corn shucker is engaged in canning corn. The least that can be said is that the processes are separable; and that the Act so contemplated is indicated by retaining the exemption as to processes other than canning.

If picking shrimp and shucking oysters are not exempted, what are the processes other than canning that were in the legislative mind? Catching, cultivating, curing, storing, freezing, and marketing, are without qualification specifically exempted from the wages and hours law. What, then, we repeat, are the processes (other than canning) that the amendment intended to exclude from the exemptions if the actual canning retroactively embraced everything previously done to the product except catching, curing, storing, freezing, and marketing? The position and punctuation of clause (5) in paragraph (a) of Sec. 213, Title 29, indicate that the parenthetical words (other than canning) modify only the preceding word "processing" and not the words "marketing, freezing, curing, storing, or distributing." Curing means to prepare for preservation or permanent keeping; to preserve as to cure beef or fish. See Webster's Dictionary. We must give full effect to all the words used by the Congress; to do this means that preparing shrimp or oysters for preservation or permanent keeping is exempted from the provisions of both Sections 206 and 207 of said Title 29. These appellants are not engaged in canning; they do

not work in the canning room; their work is frequently done without any intention on the part of their employer to can the articles that are being processed; they are engaged in a process involving shrimp and oysters that is distinct from, not necessarily related to, and often not succeeded by, canning. *Cochrane* v. *Deener,* 94 U. S. 780, 788, 24 L. Ed. 139; *Waldman* v. *Swanfeldt,* 9 Cir. 66 F. 2d 294, 295; *Henry* v. *Markesan State Bank,* 8 Cir., 68 F. 2d 554, 557; *Waller* v. *Humphreys,* et ux., 5 Cir., 133 F. 2d 193; *McComb* v. *Consolidated Fisheries Company,* 3 Cir., 174 F. 2d 74; *Cincinnati Soap Company* v. *United States,* D. C., 22 F. Supp. 141, 143; *State* v. *Pacific American Fisheries,* 73 Wash. 37, 131 P. 452–454.

The statute recognizes that, in obtaining and offering shrimp and oysters for sale for use as food, it is necessary to cultivate them, catch, cure, freeze, pack, can, or otherwise transform, them into a marketable product. Prior to 1949, Section 213 (a) (5) exempted every act of an employee in catching, curing, canning, cultivating, and marketing, any kind of shellfish or other aquatic forms of animal and vegetable life. In 1949, Section 213 (a) (5) was amended so as to exclude canning from the exemption, but it left the exemption intact as to every other distinct act and feature of the industry that was necessary to convert the raw material of aquatic life into a marketable product. As used in the statute, processing is an inclusive word that embraces all the acts necessary to improve the material and convert it into an edible product. The amendment of 1949 did not strike the word

processing out of the exempting clause (as it might have done), but limited its scope and effectiveness only to acts and doings other than canning. The act of canning is only one of several processes necessary in turning the aquatic material into food fit for human consumption. We must ascribe to the legislative mind some reason for leaving the word processing (other than canning) in the exemption clause of said Section 213 (a) (5). What are processes other than canning are questions of fact to be decided upon the special characteristics of the process or operation of the particular business or industry.

The findings of fact by the district court are not clearly erroneous; and the judgment appealed from is affirmed.

Affirmed.

RIVES, *Circuit Judge* (dissenting).

In arriving at what is included in "canning," I do not think that the word "processing" in the exempting clause of the 1949 amendment is significant, because at the same time Section 213 (b) (4) was added providing an exemption from the overtime requirements only for "the canning of any kind of fish, shellfish, * * *," and there the word "processing" was not employed. It seems apparent that the overtime exemption was intended as a substitute for the complete exemption previously provided in Section 213 (a) (5) for "any employee employed in * * * canning."

Canning is just one form of processing and to exclude everything included in the broader term would leave to canning a very limited meaning. I think that canning includes the necessary preparation of the product performed as an

integral part of a continuous uninterrupted process even though the same preparation might be necessary to make the product edible without canning. That the product must be shucked, cleaned, peeled, and cooked before it is eaten at all does not remove those operations from canning when they are performed in connection with canning and as a part of that process. Exemptions from this Act must be "narrowly construed" and extended only to "those plainly and unmistakably within its terms and spirit." *A. H. Phillips Co.* v. *Walling,* 324 U. S. 490, 493, 65 S. Ct. 807, 808, 89 L. Ed. 1095.

Nevertheless, upon the record before us, I would concur in the result if I could bring myself to believe that the case presents an actual controversy. To my way of thinking, it is plainly a "friendly" suit "in which there is no actual antagonistic assertion of rights." *C. I. O.* v. *McAdory,* 325 U. S. 472, 475, 65 S. Ct. 1395, 1397, 89 L. Ed. 1741. A careful study of the record leads me inescapably to the belief that both sides desired the same result to the proceeding and gave the Court not the slightest chance of arriving at a contrary conclusion.

The plaintiffs are two companies engaged in the commercial canning of shrimp and oysters as well as in their taking and harvesting, cleaning and processing. The defendants are eighteen "casual workers" of the plaintiffs selected by the plaintiffs themselves out of a total of about 400 laborers. We must know in reason that the defendant casual workers had no considerable funds with which to employ counsel. Upon oral argument when plaintiffs' counsel praised the

generosity of defendants' counsel in representing his clients without charge, defendants' counsel shook his head, but it is hard to say whether that was in denial of the praise or in disapproval of the propriety of the observation in open Court.

The complaint alleged in paragraph 3 that "none of the defendants above named, at any time during the period hereinabove recited was engaged in the canning of sea foods or aquatic products." The defendants admitted the allegations of paragraph 3 of the complaint. Thereby they literally admitted themselves out of Court. Further the defendants in their answer admitted that the functions which they performed (picking of shrimp and shucking of oysters) "are separate, distinct, and have no immediate relationship" to the canning, and further "that the canning * * * is separate, distinct, unrelated to and apart from the original process in which the shrimp or oysters are received at the wharf, going through a distinct and intricate process by which they become merchantable food prior to any of the actual processes needed or required in canning." The only allegations of the complaint which the defendants denied were the conclusions of the pleading with reference to the meaning of the law.

If we would assume that the admissions in the defendants' answer were made unintentionally or by oversight we have but to examine the evidence. A single witness testified for the plaintiffs, the superintendent of one of their plants. He first testified favorably to the defendants as follows:

"Q. Now, before the Court today, Mr. Mavar, is whether or not the shucking of oysters, that is, the operation beginning at the pier and ending at the pay-off window, if that is a necessary part of the canning of oysters. Do you know anything about that—I mean, are you acquainted with that? A. Yes, sir, that is a part of the canning."

The defendants made no point of this admission, but permitted plaintiffs' counsel by leading questions to get the witness to conform his testimony to the plaintiffs' case.

The plaintiffs had "other witnesses who would testify to substantially the same thing as this witness," and naturally the Court saw no necessity of examining the other witnesses. So the plaintiffs rested.

The defendants called two witnesses, both women, one the President and the other the Secretary and Treasurer of the Seafood Workers Association, a union that was supposed to represent the defendants.

The President expressed her complete accord with, and volunteered to make a moving speech for, the plaintiffs in the following answers:

"Q. If you paid them all the same 75¢ an hour, many of them would only pick about 10 pounds an hour? A. Right.

"Q. Then you would be paid 75¢ an hour for only 40¢ an hour? A. That's right. And, may I say this, that our workers don't want that. They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they

please. They can work three or four hours and go on home, and they thank God every night of their life that they were permitted to earn that day. They are satisfied and don't expect to make as much as the fast workers. Everybody is satisfied with what they can earn."

The Secretary-Treasurer was scarcely less zealous than the President in her accord with the plaintiffs:

"Q. I want to ask if there is anything that you know about this lawsuit with reference to the wages of employees, piece working employees, you care to state in any manner, of the desires in this case; have you got any information you care to give the Judge? A. We would like to work like we did in the past, which has been the method of our grandmothers and grandfathers. In piece work you earn what you can, a scale of work set by the association and then brought to a meeting with the packers. We would like to work like we did in the past."

The sensible precaution was observed by defendants' counsel of examining several of the defendants themselves, but simply as to their conclusions of whether the President and the Secretary-Treasurer of their organization had testified truthfully, accurately and correctly. In each instance the defendant witness answered yes, and that if asked all the questions the answers would be the same. That was all of the testimony for the defendants.

Small wonder that the Court found it necessary to inquire from defendants' counsel:

"By the Court:

"Let me ask you, Mr. Adam. As I understand it these defendants are really demanding the minimum wage if they are covered by it?

"By Mr. Adam, Counsel for Defendants:

"Yes. We claim they come in under the wage and hour law."

On appeal, this Court's responsibility is the more grave in that if the majority is in error, that error will probably not be corrected because the *amicus curiae* can go no further and the parties seem to be of a single mind.

If this judgment merely concluded the eighteen named defendants it would be bad enough, but when we consider that it concludes also "all persons working for the plaintiffs who are similarly situated with the defendants," and that the plaintiffs employ about 400 laborers and further that it sets a pattern for the future and affects persons to be employed in the days to come, and when we still further consider the use of this case as a precedent either by the Administrator or by the Courts, then, if the Court decides this case without the safeguard of adequate presentation of all questions of law and fact by actual antagonistic parties, it is clear that the Court itself might become the instrument of working an injustice. The effect of the decision in this case that shuckers of oysters and cleaners of shrimp are exempt wholly instead of partially from the Wage and Hour Law is relatively unimportant compared to the danger of the precedent set when we take jurisdiction of a case that involves no actual controversy.

In declaratory judgment actions such as this there are involved the interests not only of the em-

ployers who are parties and their employees, but also of competing employers and their employees, and still further those of the public. *Tennessee Coal Iron & R. Co.* v. *Muscoda Local,* D. C., 40 F. Supp. 4, affirmed 5 Cir., 135 F. 2d 320, rehearing denied, 5 Cir., 137 F. 2d 176, affirmed 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949, is taken as a precedent for this action. That case was hotly contested; counterclaims on behalf of the employees were filed and were successfully prosecuted. There was no counterclaim in the case now before the Court. In the *Muscoda* case the administrator intervened in the District Court and hence the interests of the public and of competitors were represented. Appearance of the Administrator as *amicus curiae* in the appellate court, though helpful, is not sufficient, for the record on which the case must be decided is concluded in the District Court.

If the decision in the instant case stood without dissent, I anticipate that a number of similar suits would be filed, and that in most of them the friendly nature of the suit would not be so self evident as in this case. It seems to me that in the exercise of the discretion vested in a district court, it should refuse to proceed with such a declaratory judgment action in the absence of the Administrator to represent the interests of competing employers and employees and of the public.

I think that the judgment should be reversed with directions to the district court to dismiss the cause unless the Administrator becomes a party, and therefore I respectfully dissent.

APPENDIX B

Statutory Provisions Involved

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

Section 6 (a) as amended:

Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) Not less than 75 cents an hour;

* * * * *

Section 11 (c):

Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

Section 13 (a) (5) prior to amendment:

The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any

employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof;

* * * * *

Section 13 (a) (5) as amended:

The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other acquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or byproducts thereof;

* * * * *

Section 13 (b) (4), as added by the 1949 Amendments:

The provisions of section 7 shall not apply with respect to * * * (4) any employee employed in the canning of any kind of fish, shellfish, or other acquatic forms of animal or vegetable life, or any byproduct thereof * * *.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 44

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MYRTLE GROVE PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82-85) are reported at 117 F. Supp. 599. The *per curiam* opinion of the Court of Appeals (R. 88) is reported at 217 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1955 (R. 88-89). The petition for a writ of certiorari was filed April 7, 1955, and

was granted May 23, 1955 (R. 96). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees who remove the shell from seafoods as an integrated step in the continuous and uninterrupted process of canning these products are employed in "canning", which Section 13 (b)(4) of the Fair Labor Standards Act exempts from the overtime but not from the minimum wage provisions of that Act, or are employed in "processing (other than canning)", which Section 13 (a)(5) exempts from both the overtime and minimum wage provisions.

STATUTE INVOLVED

1. As originally enacted, Section 13(a)(5) of the Fair Labor Standards Act, 52 Stat. 1060, 1067, 29 U.S.C. (1946 ed.) 213(a)(5), exempted from both the wage and hour requirements of the Act persons employed in various phases of seafood production including the "processing" and "canning" of such products. Section 13(a)(5) provided:

> The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the load-

> ing, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof;

Sections 6 and 7 of the Act, referred to in this section, provide respectively for minimum wages and for overtime pay.

2. In 1949, Section 13(a)(5) was amended by the Fair Labor Standards Amendments, 63 Stat. 910, 917, 29 U.S.C. (1952 ed.) 213(a)(5), so that "canning" was deleted from this list of exempted activities and "processing" was qualified by inserting immediately after that term the parenthetical phrase "(other than canning)", the section now providing:

> The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freeezing, curing, storing, or distributing the above products or byproducts thereof;

At the same time a new provision, Section 13(b)(4), was added, 63 Stat. 918, 29 U.S.C. (1952 ed.)

213(b)(4), providing an exemption from the overtime compensation requirement, but not from the minimum wage, for the "canning" of seafood products. It provides:

> The provisions of section 7 shall not apply with respect to * * * (4) any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof;

STATEMENT

This action was brought in 1952 by the Secretary of Labor, under Section 17 of the Fair Labor Standards Act, in the Eastern District of Louisiana to enjoin respondent from violating the minimum wage and record-keeping provisions of the Act. The employees concerned peel the shrimp and shuck the oysters in respondent's shrimp and oyster canning plant as an integrated step in the continuous and speedy process which is used in canning these products.[1]

The facts found by the District Court (R. 83-84) are based upon a stipulation of the parties (R. 26-28) and the undisputed testimony of respondent's vice-president (R. 31-51, 68-82) and of its plant manager (R. 52-67). These findings may be summarized as follows:

---

[1] Employees performing such necessary preparatory work constitute some 75 to 90% of the production workers in shrimp and oyster canning plants. *Shrimp and Oyster Canning in the Gulf Area*, Wage and Hour and Public Contracts Division of the United States Department of Labor, February 1951, unpublished.

Respondent is the Myrtle Grove Packing Company, a Louisiana corporation, which is almost exclusively engaged in the business of canning shrimp and oysters for interstate commerce (R. 83-Fdg. 1; R. 26-27). During the period from January 1, 1951, to September 30, 1952, which was stipulated and found to be "typical" of respondent's "operations and practices" (R. 83-Fdg. 1; R. 27), respondent's sales of canned shrimp and oysters amounted to $930,356.34 and constituted 97.67% of its total sales (R. 83-Fdg. 1; R. 28).[2] "Substantially all of the shrimp and oysters handled (approximately 95%)" are produced for interstate commerce (R. 83-Fdg. 1; R. 26).

Respondent organized its canning operations as a continuous process, in which the peeling and shucking of the shrimp and oysters was but one of a number of closely integrated steps (R. 83-Fdg. 2-7; R. 84-Fdg. 8-15). Thus "the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours" (R. 84-Fdg. 14); and "the entire handling of oysters" from "the beginning of the steaming process to the completion of the final sterilization of the

---

[2] In only one of the seven quarterly periods included in the stipulation did respondent sell any shrimp or oysters processed by a method other than canning, and such sales amounted to $7,569.05, or only 0.8 of 1%, of respondent's total sales (R. 28). The balance of respondent's sales, 1.53% of the total, consisted of shrimp and oysters sold in the shell with no processing whatever (R. 28), such sales ordinarily being made only when the supply available was too small to justify employing a canning crew (R. 37).

hermetically sealed cans requires only about two hours" (R. 83-Fdg. 7). Once the canning of the shrimp or oysters is begun they are not held at any step except to accumulate a sufficient quantity to begin the next step (R. 84-Fdg. 8, 15).

The first step in the canning of oysters is to cook them partially by steaming in retorts for five to ten minutes, a step which "is used only when the oysters are to be canned" (R. 83-Fdg. 3). "Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved" (R. 83-Fdg. 4). After a shucker weighs the oysters he has shucked to determine his piece rate earnings, they are dumped into a tub for washing (R. 83-Fdg. 4), and are then floated into another room where they are inspected, placed in a brine tank, and reinspected (R. 83-Fdg. 5). The oysters are then carried to the "packing room" where they are placed in cans, sealed, and subjected to further heat treatment (R. 83-Fdg. 6). The court specifically found that respondent "desire[s] and * * * attempt[s] to make the handling of the oysters in the manner above set forth a continuous process" (R. 84-Fdg. 8).

Shrimp are canned in accordance with a very similar procedure. They "are first dumped, raw, on a table where the employees here involved remove the edible portions" (R. 84-Fdg. 10).[3] They

[3] The piece rate earnings of these employees are determined by weighing the inedible portions which they have removed (R. 84-Fdg. 12).

are then floated in flumes to an inspection belt, inspected, and cooked in a blanching tank (R. 84-Fdg. 11). After reinspection and grading for size, they are carried to the "packing room" where they are placed in cans, sealed and heat treated (R. 84-Fdg. 13). The court again specifically found that respondent "desire[s] * * * and every effort is expended to make the process a continuous one" (R. 84-Fdg. 15).

The testimony of respondent's vice-president emphasized the complete integration between the preparatory work performed by the employees here involved and the actual placing of the seafood into cans. He testified that "for all practical purposes" respondent Myrtle Grove had "done nothing but can" shrimp and oysters since the opening of its plant in 1946 or 1947 (R. 47, 50) and had not to his knowledge ever canned "shrimp or oysters that were shelled or picked somewhere else" (R. 48). In addition he conceded that the handling of both oysters and shrimp had been organized "as a continuous operation" (R. 36); that the oysters were "immediately flumed into the packing room" as soon as the shucker had finished and weighed each pail on which he worked (R. 33-34); and that the shrimp were similarly handled (R. 35-36).

The District Court held for respondent and dismissed the complaint (R. 85), on the sole ground that "[i]ndependent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in

Donnely v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d. 409" (R. 84-85). The Court of Appeals affirmed in a one line *per curiam* opinion (R. 88) citing only its *Donnely* decision.[4]

SUMMARY OF ARGUMENT

The 1949 amendments to the Fair Labor Standards Act extended minimum wage benefits to employees engaged in "canning" seafoods and related products and limited the exemption theretofore granted to employees engaged in "processing" to those engaged in "processing (other than canning)." When these amendments are analyzed, it becomes evident that the Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, correctly decided that cannery employees, performing necessary preparatory operations as an integrated step in the continuous and speedy process used in canning seafood, were engaged in "canning" and not in "processing (other than canning)." The decision below, which reached a contrary conclusion, is erroneous and should be reversed.

A. The plain meaning and express legislative purpose of the exemptions in issue support the Fourth Circuit's *Blue Channel* holding that the term "canning" includes necessary preparatory work of the type here involved. The obvious design of the 1949 amendments, in changing Section 13(a)(5) and adding Section 13(b)(4), was to extend the minimum wage benefits of the Act to work-

[4] Both the majority and dissenting opinions of the Fifth Circuit in the *Donnely* case are included in full in the printed record of the case at bar (R. 89-96).

ers in the fishery and seafood industries employed in "canning." If there were any doubt that the term "canning" was meant to include necessary preparatory operations, it is specifically resolved by the legislative reports. The amendments, as enacted, were agreed on by a conference committee, and the reports of both Senate and House Conferces expressly stated that "canning" includes "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers." 95 Cong. Rec. 14932-33; 14878.

B. The decision below rests solely on the erroneous assumption that the term "processing (other than canning)" in Section 13(a)(5) would be meaningless if not construed to embrace preparatory operations such as picking and shucking. As the Fourth Circuit pointed out in *Blue Channel:* "Certainly, scores of situations could be mentioned in which products are processed but not canned." 198 F. 2d at 248. The exemption for "processing (other than canning)" has substantial practical meaning and ample scope for operation apart from the preparatory operations necessary for canning.

C. The consistent administrative interpretation of the term "canning," both prior and subsequent to the 1949 amendments, is in accord with the Fourth Circuit's decision. The failure of Congress to disturb this administrative construction at the time of the 1949 amendments confirms its validity. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13. Moreover, the Fifth Circuit's broad construction

of Section 13(a)(5) and narrow construction of Section 13(b)(4) is diametrically opposed to this Court's repeated rulings that exemptions from this remedial legislation must be narrowly construed and its coverage provisions liberally construed. *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517.

ARGUMENT

Cannery Employees Performing Necessary Preparatory Operations as an Integral Part of the Canning Process Are Employed in "Canning" to Which Congress Extended Minimum Wage Protection in 1949.

The 1949 amendments to the Fair Labor Standards Act *supra*, pp. 3-4, extended minimum wage benefits to employees engaged in "canning" seafoods and related products and limited the exemption theretofore granted to employees engaged in "processing" to those engaged in "processing (other than canning)." In applying these amendments, a square conflict has developed between the Fourth and Fifth Circuits as regards cannery employees engaged in the regular and necessary preparatory work of removing the shell and other inedible portions of seafood as part of the continuous, speedy, and uninterrupted process normally used by respondent and other cannery operators in the production of canned seafood. The Fifth Circuit, in the instant case and in its earlier decision in *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F.2d 409, concluded that such cannery employees were engaged in "processing (other than canning)" and thus excluded from minimum wage benefits. The

Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F.2d 245, held that these employees were engaged in "canning" and, therefore, entitled to the protection of the Act.

Donnely v. *Mavar Shrimp & Oyster Co., supra,* unlike the instant case, was a declaratory judgment action instituted by employees. As pointed out by Judge Rives in his dissenting opinion in that case, 190 F.2d at 412-414 (R. 92-96), the Government was not a party to the litigation, which appeared to be "plainly a 'friendly' suit" in which "both sides desired the same result" (R. 92-93). The parties there had in effect stipulated the very issue in controversy in the instant case by agreeing that none of the employees involved was "engaged in the canning of sea foods or aquatic products," and that the picking of shrimp and the shucking of oysters "are separate, distinct, and have no immediate relationship" to canning (R. 93). On the basis of this factual concession made by the parties, a majority of the panel which sat on that case concluded (R. 89-92) that such employees were engaged in "processing (other than canning)" within the meaning of Section 13(a)(5) rather than "canning" within Section 13(b)(4).

Tobin v. *Blue Channel Corp., supra,* in which the Fourth Circuit reached a contrary result, was brought by the Secretary of Labor. In a unanimous opinion, that court carefully reviewed both the legislative history of the 1949 amendments and the factual data regarding the close integration of each step in the canning process. The

majority decision in *Donnely* was considered and rejected as erroneous. The court held that cannery employees who removed crab meat from the claws of the crab preparatory to its being placed in cans were employed in "canning" within the meaning of the amended Act. Pointing out that "extracting the crab meat from the claws, is an early and preparatory, but none the less an essential and integrated, step in the continuous and uninterrupted process of canning crabmeat," the court recognized that it could not "view the necessary preparatory operations of the claw pickers in picking and sorting the crabmeat in isolation from the canning process as a whole." 198 F.2d at 248.

A. Both the Express Language Used in the 1949 Amendments and the Legislative Reports Show that the Term "Canning" Includes Closely Integrated Preparatory Work.

Prior to 1949, persons employed in various aspects of the production of seafood and related products, including "processing" and "canning," were exempted by Section 13(a)(5) of the Fair Labor Standards Act, *supra,* pp. 2-3, from both the minimum wage and overtime requirements of that Act. In 1949 the Act was amended, by the addition of a new Section 13(b)(4), *supra,* p. 4, to extend minimum wage benefits to employees engaged in "canning" such products. At the same time, by amendments made to Section 13(a)(5), *supra,* p. 3, the word "canning" was deleted from this section and the exemption applicable to those employed in "processing" was limited to "processing (other than canning)."

The decision in the *Blue Channel* case is in direct accord with both the normal meaning of these terms and with the express purpose of the statute in which they appear. The obvious design of the amendments was to extend the minimum wage benefits of the Act, but not the overtime provisions, to those workers in the fishery and seafood industry employed in "canning." To make it unmistakably clear that the complete exemption would no longer apply to canning, the generic word "processing" was expressly qualified by the insertion of a parenthetical phrase which can have had no purpose other than to preclude its extension to anything properly included in the term "canning."

If there were any doubt as to the meaning of these amendments, insofar as concerns the integrated preparatory operations here involved, it is resolved by the legislative reports. Both the form and the substance of the Section 13(a)(5) and Section 13(b)(4) exemptions were the work of the Conference Committee which expressly explained that "canning" includes "*necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers*". 95 Cong. Rec. 14932-33. (Emphasis added.)

As originally adopted by the House of Representatives and the Senate, the amendments had differed in their treatment of fish canning. The Senate amendment made no change in the 1938 Act in this particular. The House bill provided a 14-workweek exemption for any industry engaged in the first processing or canning of fish in the raw or

natural state. The bills were then referred to a conference committee to reconcile the differences (95 Cong. Rec. 14932). The compromise bill as agreed on by this committee was adopted and enacted into law. The unanimous report of the House conferees, explaining this bill to the House of Representatives before it was adopted by that body, said with respect to the activities embraced in the word "canning":

> * * * Under the conference agreement "canning" means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. It *also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers.* Also included are subsequent operations such as the labeling of the cans or other containers and the placing of the sealed containers in cases or boxes whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. [95 Cong. Rec. 14932-33; emphasis added.]

The same description of "canning" appears in the statement submitted by a majority of the Senate Conference. 95 Cong. Rec. 14874, at 14878.

Under the restrictive interpretation of the term

"canning" adopted by the court below, minimum wage protection is accorded only to those canning plant employees who work in the "packing room" (R. 83-Fdg. 6; R. 84-Fdg. 13) where the food is actually placed in the cans and hermetically sealed. Such protection is denied to cannery employees who work in rooms adjoining the "packing room" performing necessary preparatory work on the food about to be placed in the cans and immediately before it is given its final handling by the "packing room" crew. This distinction not only does violence to the normal meaning of the term "canning," but is squarely contrary to the legislative purpose manifested by the 1949 amendments and the accompanying congressional reports. This is particularly so where, as here and in *Blue Channel*, "canning is the main objective * * * and * * * is accomplished by a continuous series of operations" (198 F.2d at 248).

B. The Term "Processing (Other Than Canning)" Covers Many Types of Operations and Is Not Rendered Meaningless by Excluding the Closely Integrated Preparatory Work Here Involved.

In *Donnely*, the court below expressly noted the congressional object of including within the term "canning" "every other operation necessarily performed on the products before they are placed in cans" (R. 90; 190 F. 2d at 411), but declined to give it effect as regards the peeling and shucking operations here involved. Its exclusion of these operations seems to rest solely on an erroneous factual assumption that the phrase "processing (other

than canning)" used in Section 13(a)(5), as amended, *supra*, p. 3, would be meaningless if not construed to embrace peeling and shucking.

As the Fourth Circuit pointed out in *Blue Channel*, "[c]ertainly, scores of situations could be mentioned in which products are processed but not canned." 198 F. 2d at 248. One ready example of the very substantial meaning and practical importance of the exemption for "processing (other than canning)" is the filleting of fresh fish. Another is the production of oil and meal from menhaden and other fish.[5] Neither the extracting and rendering of oil from the fish nor the filleting of fresh fish is included in the specifically mentioned operations—other than "processing"—exempt under Section 13(a)(5). Furthermore, the terms of the exemption itself show that it applies to many products which are processed in ways not involving freezing, curing, storing or canning. Its terms embrace not only fish, but also "sponges, seaweeds, or other aquatic forms of animal and vegetable life". Thus, the general word "processing" may apply to such activities as the drying of seaweed preparatory to the manufacture of agar and to the drying and cleaning of sponges.

The processes applied to the materials mentioned in Section 13(a)(5) are, therefore, many

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[5] "Practically the entire 1951 menhaden production was used in the manufacture of oil and meal." *Fishery Statistics of the United States 1951*, Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., p. 289. The value of such oil and meal was $23,650,677. *Ibid.*, pp. 41-42.

and varied. The reasonable construction of the word "processing", as used in that section, would seem to include all of such processes, though not specifically named, except the process of canning, which has been specifically excluded. This interpretation gives the word "processing" the meaning which context and legislative history require, without distorting the ordinary meaning of the term "canning."[6]

C. In Construing "Canning" So as to Exclude Closely Integrated Preparatory Work, the Court Below Has Failed to Apply Appropriate Standards For Interpreting the Act's Remedial Coverage Provisions.

The decision below, and that in *Donnely*, is also inconsistent with well-established principles, repeatedly emphasized in the decisions of this Court, for interpreting the Fair Labor Standards Act. These two Fifth Circuit decisions totally ignore the long-standing and directly pertinent administrative interpretation of the term "canning" as used in the Act both prior and subsequent to the

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[6] The fishing industry itself has regarded "processing" as a generic term including various methods of preparing its products for market, among which are "canning," "filleting", "extracting of oil", and "manufacturing of meal". See *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 57 (C.A. 8), quoting the industry's definition of the term in its NRA Code:

> The term "processing" means the packing in ice of, filleting of, cutting of, freezing of, salting of, smoking of, drying of, canning of, extracting oil from, manufacturing meal or fertilizer from, products of the industry; or otherwise manipulating products of the industry; * * *.

1949 amendments. They also adopt an approach squarely opposed to this Court's repeated holdings that the Act's coverage provisions should be read liberally and its exemptions narrowly.

The consistent administrative interpretation of the term "canning", first adopted in 1939, has been that it "includes the necessary preparatory operations performed * * * before the commodities are placed in bottles, cans, or other hermetically sealed containers * * *. These operations may include all types of preparations of the product, such as heating, cooking, peeling, s[illegible]eezing, cutting, cleaning, mixing, etc."[7] Significantly, this was the administrative construction even where its effect was to extend the scope of the various exemptions for "caning" prior to the 1949 amendments, it being recognized that any reasonable interpretation of the term should include such necessary preparatory operations. If the somewhat broader construction of the term was warranted when it resulted in extending the scope of an exemption, there is certainly no justification for abandoning it when it operates to liberalize the scope of coverage of the minimum wage. The validity of the Administrator's construction is confirmed by the fact that it was left unaltered by Congress in the 1949 amendments. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17.

[7] Interpretative Bulletin No. 14, par. 34, originally issued August 21, 1939, 1940 WH Man. 180, 194; 1951 WH Man. 35;351, 365; Release M-10, dated February 14, 1947, 1951 WH Man. 35-62.

The decision below gives the broadest possible scope to the complete exemptions of Section 13(a)(5) and construes as narrowly as possible the language of Section 13(b)(4), which was enacted to extend the coverage of the minimum wage provisions of the Act. As the Fourth Circuit said of the latter provision in *Blue Channel:* "We are here dealing with a remedial statute. Its terms of coverage should therefore, be liberally rather than narrowly construed". 198 F. 2d at 248. The Fifth Circuit's approach is thus diametrically opposed to this Court's repeated and consistent rulings that "[a]ny exemption from such humanitarian and remedial legislation must * * * be narrowly construed", and its coverage provisions liberally construed. *Phillips Co.* v. *Walling,* 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617; *Powell* v *United States Cartridge Co.,* 339 U.S. 497, 517.

CONCLUSION

The decision and judgment of the Fifth Circuit should be reversed, and the case remanded to the District Court with directions to enter a decree for petitioner.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 44

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

MYRTLE GROVE PACKING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, MYRTLE GROVE PACKING COMPANY.

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Argument:

Oyster shuckers and shrimp pickers, while performing a process that effectually changes natural edible and live shrimp and oysters into a commodity that could be canned, were not necessarily involved in a process of canning. The whole question in this case revolves around the meaning of the words used by the Congress in its 1949 Amendment to the Fair Labor Standards Act 7

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BRIEF FOR THE RESPONDENT, MYRTLE GROVE PACKING COMPANY.

OPINIONS BELOW.

The statement of the petitioner as to the opinions is correct.

JURISDICTION.

The jurisdiction is properly stated.

QUESTION PRESENTED.

The question is incorrectly stated in that the petitioner assumes that the court found below that there was an integrated process, continuous and uninterrupted, of canning shrimp and oysters, whereas, as contended by the respondent and found by the court, the employees of the respondent were not engaged in a continuous and uninterrupted process of canning.

STATUTE INVOLVED.

This question is, as we believe, properly stated.

STATEMENT.

The statement of facts set out in the brief of the petitioner in the main states the true facts of the case, but as in all other statements made by the petitioner, it is tinged with his absolute belief in the error of fact in the decision of the court below.

However, in order to expedite the process of the law, we shall not attempt to restate the case, except to call to the court's attention the following:

Petitioner's statement incorrectly alleges that "After a shucker weighs the oysters he has shucked to determine his piece rate earning, they are dumped into a tub for washing, (R. 83, Fdg. 4), and are then floated into another room where they are inspected, placed in a brine tank, and reinspected. (R. 83, Fdg. 5). The oysters are then carried to the 'packing room * * *'." (Petitioner's Brief, p. 6).

The undisputed facts show that after the meat is taken by the shucker to be weighed to determine his piece rate pay, it is flumed directly into the "packing room" where the oyster meat is "inspected and washed and portions of shells and oysters that might not be top quality are removed. Then they are carried along to packing tables where they are put into cans." (R. 32).

Petitioner's statement also incorrectly alleges that "They (the raw picked shrimp) are then floated in flumes to an inspection belt, inspected and cooked in a blanching tank. (R. 84, Fdg. 11). After reinspecting and grading for size, they are carried to the 'packing room' where they are placed in cans, sealed and heat treated.(R. 84, Fdg. 13)". (Petitioner's Brief, p. 7).

The undisputed facts again show that "* * * the pickers pick the hulls, separate the hulls from the meat, and they keep the hulls in a bucket and the meat is flumed immediately into the packing room where it goes for canning there. (R. 35). After this, the shrimp meat is partially cooked, cooled and inspected, partial hulls removed from them, and carried to a grading machine which separates them for size. Then they are carried to the packing table and each can weighed and run on down to the canning machine line, and then put into a retort Bettle for a final cooking. (R. 36).

In R. 26 there was a stipulation entered into between the Department of Labor and the Myrtle Grove Packing Company, and in this stipulation in paragraph 2, the Department of Labor agreed to the following facts: "Defendant" (Myrtle Grove Packing Company) is engaged

in the purchase, handling, **processing,** canning, sale and distribution of shrimp and oysters." And in paragraph 3 of the same agreement, R. 26, it was further agreed as follows: "Substantially all of the shrimp and oysters handled (approximately 95%) were **processed** and canned." It would therefore appear that the Department of Labor itself agreed that there was a process separate from canning, for nowhere in the record is there mentioned any process involving these shrimp and oysters aside from the process of canning, except the original process carried on by the shuckers of oysters and pickers of shrimp in their work looking towards the processing of shrimp and oysters so that when separated from shells and hulls, both valuable by-products, the meat could be used in various ways as salable, edible seafood.

As shown by the record, the "handling" referred to consists of unloading the shrimp and oysters and conveying them to the point at which the first processing begins, which in the case of shrimp is the separating of the hulls from the meats and in the case of oysters is the washing and initial steaming to make the oysters more readily opened, and the actual opening of the oysters, and separating the meat from the shell. (R. 32, 35). (This Brief, Appendices 2 and 4).

"Canning" in the case of shrimp consists of the preparatory operations to the actually hermetically sealing of the can, such as the cleaning, inspecting, boiling, reinspecting and grading, placing in cans, seasoning of the meats in the cans together with the finally hermetically sealing of the cans, casing and labeling. (R. 49); (This Brief, Appendix 5).

Canning of oysters consists of washing, inspecting, weighing of the meats, placing in cans and seasoning together with the hermetically sealing of the cans, including sterilization by steaming, cooking, casing and labeling. (R. 49); (This Brief, Appendix 3).

It would further appear that the District Court, in his finding of fact, adopted this stipulation as a portion of his finding of fact. (R. 83).

Certainly the record further abundantly shows that there was no need for any continuity of operation, either with reference to shrimp or oysters, except for the purpose of saving the necessity of refrigerating the processed food, and when this was done, both the shrimp and oysters could be packed and were sometimes packed in canneries miles away. In other words, the rapidity of all of the efforts of the various persons having to do with shrimp and oysters was in order to prevent any injury to the health of users of this product.

SUMMARY OF ARGUMENT.

Congress added when amending in 1949 Sec. 13(a) 5 of Fair Labor Standards Act "(other than canning)" to processing. The Fifth Circuit Court of Appeals in *Donnelly v. Mavar Shrimp and Oyster Company*, 190 F. (2d) 409, decided against the Labor Department's contention that canning included the earlier processes of shucking of oysters and hulling or picking shrimp, finding that canning included only those steps necessary to canning. These acts are performed by a class having special skills and, as a class, their activities as laborers have the same impracticability of regulation as seamen.

The *Donnelly* case expressed the view of Congress in its holding that the Conference Report of Congress meant "necessary preparatory operations", performed on products before they are placed in bottles, cans, or other containers" to mean those things and operations as ordinarily understood to be canning and so defined.

The purpose of the Fair Labor Standards Act is to give able bodied men and women a reasonable pay for a fair day's work. The workers in this industry have progressed at a higher rate than those covered by the act. Their pay basis enables those who are not able bodied to assist in earning a living.

The *Donnelly* rule will allow a continued accomplishment of the purposes of Act. The *Blue Channel* rule will result in the replacement of many of these workers by machinery.

"Processing" as used in Sec. 13 (a) (5) of the Act includes all the steps in preparing seafood to be consumed. Canning limited "processing" only as canning is ordinarily understood and as it is defined. When shrimp are picked or oysters shucked, the seafood is transformed into a usable product. It can be further processed by curing, freezing or canning. It can be consumed in that state.

This exemption in favor of these workers is because they are a separate and distinct class of worker. They are free, independent, and work when and for whom they please. Their working procedures have grown over a period of years. If they are changed the employees will have to be replaced by machines.

Since canning does not necessarily include every step in the chain of causation it is not necessary or proper to read into the plain language of Congress a limitation that will destroy this class of worker and change the expressed Congressional intent.

ARGUMENT.

OYSTER SHUCKERS AND SHRIMP PICKERS, WHILE PERFORMING A PROCESS THAT EFFECTUALLY CHANGES NATURAL EDIBLE AND LIVE SHRIMP AND OYSTERS INTO A COMMODITY THAT COULD BE CANNED, WERE NOT NECESSARILY INVOLVED IN A PROCESS OF CANNING. THE WHOLE QUESTION IN THIS CASE REVOLVES AROUND THE MEANING OF THE WORDS USED BY THE CONGRESS IN ITS 1949 AMENDMENT TO THE FAIR LABOR STANDARDS ACT.

The Congress did not say in this Amendment that the exemption was removed from all persons where the seafood was canned, nor does the correct and exact meaning and punctuation of the language used even suggest this. On the contrary, if we give effect to the meaning of the language used, the words "(other than canning)" qualified "processing" only to the extent that "processing" was canning.

Now if canning were not a separate and distinct process, recognized by people of the most ordinary intelligence for the last one hundred years as something exact in its nature and separate and apart from other processes, then there would be more validity to the argument of the petitioners that this qualification of "processing" de-

stroyed all exemptions of those persons engaged in processing of edible, aquatic matter if the goods were afterward canned.

In support of the petitioner's position that reason and logic and law lies in the opinion in *Tobin v. Blue Channel Corp.*, 198 F. (2d) 245, rather than in the opinion rendered by Judge Holmes in *Donnelly v. Mavar Shrimp and Oyster Co.*, 190 Fed. (2d) 409, the petitioner set up the fact that the *Mavar* case was a declaratory judgment case. Certainly it is to be presumed by the court that the Circuit Court of Appeals of the Fifth Circuit would give the same consideration to a legal question presented in the complaint seeking a declaratory judgment as it would in any other type of litigated action. And therefore, the statement by the petitioners that the *Donnelly* case was a declaratory judgment action, is wholly beside the point. Furthermore, regardless of what Judge Rives said in the *Donnelly* case, the government was in fact a party to that litigation, having obtained permission to file and having filed a most exhaustive brief in opposition to the lower court's holding that shrimp pickers and oyster shuckers were covered by the exemption, the subject of this litigation. Furthermore, in no wise was the decision in the *Donnelly* case founded upon any agreement, but rather upon the record and the very logical reasoning of the court that in the very nature of things, a shrimp picker or an oyster shucker was not a canner of seafoods. This is utterly reasonable, because the record in this case and common knowledge of this most interesting occupation, shows that the very same people who prepare shrimp or oyster meats, that are afterwards canned, use their skill and labor for the preparation of the same articles when

there is no thought of their being canned. And furthermore, it appears by the evidence overwhelmingly both in this case and in the *Donnelly* case, that there is no need for the immediate canning of shrimp or oysters, that it does not have to be what the petitioners call an integrated process, but that the oyster and shrimp meat resulting from the shuckers and shrimp pickers work, can be and is often carried miles away before it is used in a cannery. (R. 43).; (This Brief, Appendix 1).

We admit that in *Tobin v. Blue Channel*, that the Fourth Circuit reached an opinion absolutely harmonious with the reasoning of the Secretary of Labor, but we deny that under the law it was compelled to follow this reasoning rather than the logical reasoning of a court of law, over a matter which it had jurisdiction. Furthermore, there was a difference in the type of person involved in the exemption claimed in the *Blue Channel* case, for there is no definite type of laborer known as a crab picker. Almost any person, in any locality where crabs are canned, may to a certain extent follow this occupation, and they do, for this is a new occupation, using new labor, whereas from the beginning of the shrimp and oyster industry in America, evolving from a certain class of people having special skills, came the subject matter of this lawsuit, shrimp pickers and oyster shuckers.

In *Anderson v. Manhattan Lighterage Corp.*, 148 Fed. (2d) 971, the barge captain performed at times nearly every act that is required to be performed by seamen, but the court said they were not seamen, even though they worked upon a vessel and performed duties, ordinarily required, at times, of members of the crew of a

vessel, and in arriving at this conclusion among other things, the court in holding that they were not seamen and therefore come under the provision of the Fair Labor Standards Act said "persuasive also is the further reason behind this exemption, namely, the impracticability of regulating the wages and hours of ordinary seamen in the manner contemplated by the Act". Here were people engaged on a seaworthy vessel used to transport commerce to the far corners of the earth, who were held not to be seamen and in deciding this fact, the court took the position that seamen, in a way, had to be exempted from the Act because of the impossibility of regulating the wages and hours of the seamen.

In the present case, the people involved, young and old, whole and handicapped, are shown to be separated from ordinary persons employed in a cannery by the manner of their work, the hours of their working, and the customs surrounding their work, all of which made impossible any reasonable compliance with the Act, were they to be brought under its protection.

A. NOTHING IN THE LANGUAGE OF THE 1949 AMENDMENT OR THE LEGISLATIVE REPORTS IS REPUGNANT TO THE OPINION IN THE *DONNELLY* CASE.

Certainly the historical facts alleged by the petitioner on Page 12 of his brief are correct. However, the inferences drawn from the fact are not correct, for a reading of the original exemption and the exemption as amended shows no thought on the part of the Congress of any intention to exclude any of the workers mentioned in

their broad exemption, except workers engaged in canning. Now as we have said before, the *Blue Channel* case is in direct support of the petitioner's argument, but it is not in accord with what would appear to be the expressed intention of the Congress in writing the amendment in Section 13(a) (5) into the list of exemptions from the provisions of the Fair Labor Standards Act. We feel here, that in as much as we are of the opinion that not only reason influenced the *Donnelly* decision, but also a sense of fair dealing and justice on the part of the court, that we have a right to reason with the court as to the meaning of the amendment mentioned above.

A close reading of Judge Holmes' opinion and the explanation of the amendment given by the Committee in Congress will show that there is absolutely no conflict between Judge Holmes' conception of the extent of the law and the intention of Congress as expressed in their report on the law.

At the time Congress was considering the law, it is a matter of common knowledge that vast quantities of fish, in fact the largest amount of fish caught in America, was processed, and a great portion of it was processed in the same canneries or factories or fishing wharves or whatever you may call them, where some part of the fish was canned for consumption by people who were not in a position to receive fresh or frozen fish.

Therefore, Congress had before it the knowledge that fish were handled in two ways, in one way by refrigeration and in the other way by hermetically sealing in cans, and when it provided that the word "canning" was

to include preparatory work it certainly had in mind the preparatory work immediately preceding the actual canning, which is done always in the case where goods are canned.

We see from the record in the case at bar and from the evidence of record in the *Donnelly* case, which is attached to this brief as appendices, 1 through 5, including the series of pictures attached thereto that four or five operations in the canning room were done in preparation for the actual canning.

In the case of shrimp, the shrimp were washed, inspected, blanched, sorted for size, placed on racks, dried, afterwards weighed, brine was added to their content, then the cans were sealed and later pasteurized.

All this was work done in preparation for canning and was the same sort of work that is always performed where goods are canned, and was in fact, according to the definition given the word, actual canning. These employees are paid in accordance with the Act.

The work of the shrimp pickers and oyster shuckers, while sometimes in assistance to the actual canning, was not a part of the canning, which was something separate and apart from the canning, including as it did, the use of artificial means to open the oysters, beheading and shelling the shrimp, inspecting the shrimp and taking the oyster from the shell, which process created not alone the aquatic food that could be canned, but did not have to be canned, but also other valuable by-products such as oyster shells and shrimp hulls used for fertilizer, cement, etc.

We, therefore, say that the court found in the *Donnelly* case that we were obeying the law in paying those persons engaged in canning and in the "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers."

B. ANY REASONABLE CONSTRUCTION OF THE WORD "PROCESSING" AS USED IN THE EXEMPTION, SHOWS THAT SUCH PROCESSING WAS QUALIFIED ONLY BY THE ACTUAL ACT OF CANNING AS ORDINARILY UNDERSTOOD.

We disagree with the position of the petitioner that the court in the *Donnelly* case, while recognizing that "canning" included "every other operation necessarily performed on the products before they are placed in cans", would not give effect to its recognition of this fact.

In other words, the petitioner assumes that only such logic and reason as possessed by the petitioners or the courts agreeing with them is entitled to consideration. That is not true. Varying persons have varying conceptions of the effects of the same Act on the same state of facts and in the logic and reason used by the court in the *Donnelly* case, it was not only buttressed by justice and right, but also by every interpretation of the word "canning" that can be found in our laws or in books defining this word.

Canning certainly is an operation that was clearly defined before the Fair Labor Standards Act was ever thought of and for over one hundred years this definition has stood, and all that the court in the *Donnelly* case held was that this separate and distinct class of workers, that

is, shrimp pickers and oyster shuckers, were performing a process that, while connected with, was not necessarily a part of canning and often was done without any thought of canning. (R. 39, Appendix 1, P. 23, P. 26). Certainly, the court was exercising only a rule of reason in arriving at this conclusion from all the facts before it in the *Donnelly* case, which is set out in the Appendices to this brief.

In *Maneja v. Waialua Agricultural Company*, 349 U. S. 254, a case which is cited by the petitioner, the court found that trainmen and machinists, because of the circumstances of their work, would be classed as agricultural laborers. Now, certainly, the record in this case abundantly shows that shrimp pickers and oyster shuckers are a separate and distinct type of labor, necessary in the processing of seafood, but not absolutely necessary in canning. They were not engaged in canning, their business often had no connection with canning. In the *Donnelly* case the Court did not narrowly construe the law, but construed it intelligently so as to avoid the destruction of a peculiar and particular type of labor, who by their own efforts, and without the assistance of the Fair Labor Standards Act, since the passage of this act, have increased their pay nearly one thousand percent. See Appendix I, page 44. As we will point out later in our argument, this appeal is merely for the purpose of deciding whether the *Blue Channel* case, *supra*, or the *Donnelly case*, *supra*, is a reasonable statement of the law, and in its brief the petitioners can see nothing but logic and reason in the *Blue Channel* case. However, an examination of the authorities will show that this opinion is not supported by

relevant law and other controlling facts, as is the opinion in the *Donnelly* case.

C. THE *DONNELLY* CASE IN ITS CONSTRUCTION OF THE PARENTHETICAL WORD "CANNING" AS USED IN THE EXEMPTION DOES NOTHING TO AFFECT THE REMEDIAL PURPOSES OF THE FAIR LABOR STANDARDS ACT.

In *Phillips v. Walling*, and many other later decisions, this court has virtually declared that the purpose of the Fair Labor Standards Act was to give to able-bodied men and women a reasonable pay for a fair day's work and the court has in its construction of particular cases, varying from case to case, often said that the purpose of the law and of the court's construction, was to remedy the particular evil which existed.

Now how has the construction of the word "canning" by the Fifth Circuit affected the remedial coverage of the Fair Labor Standards Act?

For the purpose of understanding this, we believe that we have a right to consider the history of the Act and its purpose to destroy certain mischief inherent in low paid labor. It is apparent from the construction of the Fair Labor Standards Act in *Phillips Co. v. Walling*, 65 S. Ct. 807, 808, 324 U. S. 490, 493, that the purpose of the Act, was, and we quote "insuring to all able-bodied working men and women a fair day's pay for a fair day's work". Now the court's construction of the word "canning" in the *Donnelly* case in no wise affected this purpose. It appears from the record, that people working in the plants who were actually engaged in the canning process, were

paid at least the minimum wage and that the only persons not paid under the Act were those who were specifically excluded from the Act, including the shrimp pickers and oyster shuckers who were engaged in a process "(other than canning)".

Many of these shuckers and pickers are not able-bodied people (R. 13, Appendix 1, Pp. 43-44) but on the contrary are the unfortunates who stand on the fringe of the present little economic upheaval, where the government has found it necessary to protect the lower segments of the labor force. They are not only not able-bodied, but many of them can't do a day's work; in fact they work sporadically according to their will and ability. (R. 15, R. 77). But in doing this they have not only made a living for themselves, or assisted others in making a living for themselves, but during the whole life of the Fair Labor Standards Act have come into court only once, to urge the coverage of that act, and that is when they were brought into court in the *Donnelly* case. And in the record of that case, Appendix 1, P. 44, it is clearly shown that these people, whom the government affects to be protecting, have actually raised their wages during the life or period of the Fair Labor Standards Act nearly one thousand percent, whereas, all the law could do during the lifetime of the Fair Labor Standards Act was to raise the pay of common labor two hundred fifty percent. In other words, this is not a case where there is any mischief to be corrected, nobody is being injured, or has asked for any help from the Labor Department, but on the contrary, because the Labor Department, the petitioner here, wants to bring this separate class of workers into conformity with all other persons actually engaged in can-

ning, the petitioner has set about a deliberate course that will not advance the interests of these people but on the contrary, if successful, will replace them with machines. (R. 77). Therefore, the argument of the petitioner that the decision in the *Donnelly* case is wrong, rests on its opinion that courts must follow the administrator's idea of the meaning and construction of an act. In other words, the administrator says that the meaning of the words "(other than canning)" does not qualify "processing" when "processing" does not precede canning, and when the processing is succeeded by canning it extends the meaning of the word "canning" so that it would go back even to the fishermen who remove the oysters from the bottom of the sea, for sometimes this is done less than an hour before these oysters are shucked in the shucking shed of the packing plants, which also maintains a cannery.

The only reason why courts have held that exemptions should be strictly or narrowly construed, is because the basic law is thought good and only those persons should come within the exemptions that would not be benefited by the law or affected by the law. We do not think that the court must always construe the law narrowly, when it would mean an injustice, or would not work towards furthering the purposes of the law it is construing.

In this case, the lower court said that canning is canning, not processing, and refused to strike from the exemption, which is one of the broadest exemptions in the law, the word "processing". For instance, if there was a section of the law which exempted every class of worker in the meat packing industry other than canning, would it be

reasonable to construe the law to the effect that a man in killing a beef, skinning a beef or chemically making parts of the beef into drugs, would be engaging in the occupation of canning merely because this processing was qualified by the words "other than canning" and preceded the canning of such meats, as arose from these processes? We do not believe this could be true.

We call the court's attention here, that the fishing industry is not a canning industry. Sometimes it is accompanied with canning, but it has ramifications which extend far beyond the dreams even of Nicholas Appert, the man who discovered canning. And therefore, by the logical use of a word, "canning", processes which are as old as this industry are not immediately turned into canning. Certainly the court will not use this construction when such a construction is not necessary, where there is no mischief to be remedied, where the philosophical, economical and social purposes of the law in question were not required to protect these people and where such a construction will destroy. not aid or assist, the people. I hope that we are not guilty of any violation of the court's rules when we say here that sometimes "The letter of the law killeth, but its spirit giveth life."

In the *Donnelly* case, *supra*, the court, with all of the facts of this particular and interesting occupation before it, decided that it had a peculiar situation to adjudge, that it was dealing with living human beings, who would be affected by its judgment, that a construction of the law based upon the administrator's interpretation would not assist in carrying out the spirit of the Fair Labor Standards Act, but would only be in assistance of the

conformity demanded by the administrator, and with all this before it, it reasonably, intelligently, logically, and justly construed the Act so "not as to remedy any mischief, but rather to prevent a mischief," which would be a serious threat to the livelihood and existence of the group of women, old men and old women, who could not secure work elsewhere, R. 15, but who are making a living now in carrying out the work of their fathers and were doing it so successfully that without any government protection, in twenty years their pay had increased one thousand percent.

Moreover, the present method of payment on a piece rate basis is what all of the shuckers and pickers want.

Mrs. George Duvall, President of the Seafood Workers Association Union, when testifying in the *Donnelly* case said "And, may I say this, that our worker's don't want that. (To be covered under the Act). They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they please. They can work three or four hours and go home, and they thank God every night of their life that they are permitted to earn that day. They are satisfied and don't expect to make as much as fast workers. Everybody is satisfied with what they can earn. (Appendix 1, p. 43).

Her testimony was fully substantiated by Mrs. Florence Powloski, Secretary-Treasurer of the same Union, who testified that the union bargains with the packing plant owners for their scale of wages and that "We would like to work like we did in the past, which has been the

method of our grandmothers and grandfathers." (Appendix 1, p. 46).

D. THE WORD "PROCESSING", AS USED IN THIS EXEMPTION OF PERSONS ENGAGED IN THE FISHING INDUSTRY, IS A GENERAL TERM, EMBRACING EVERY PROCESS WITH REFERENCE TO EDIBLE SEAFOOD, EXCEPT THE PROCESS OF CANNING.

Prior to October 26, 1949, the words "(other than canning)" used parenthetically to modify or limit the word "processing" were not in the act.

It is the position of the respondents, substantiated by the overwhelming evidence introduced and found to be fact by the court, that the canning of oysters in the seafood industry is but one of the processes necessary to prepare seafood for market; that shrimp taken from the sea are transformed to merchantable and salable goods, when, and only when, they have been subjected to several processes, the first and most important of which is picking. After this they may be sold and merchandised in the numerous forms set out in the opinion of Judge Holmes in *Donnelly, et al., v. Mavar Shrimp and Oyster Company, Ltd., et al.*, 190 F. (2d) 409, one of which is by canning. The use of these shrimp in the canning process does not by some magic change the nature of the previous picking process and convert it too, into the canning process.

It would appear from the facts in the *Donnelly* case, which were similar to the facts in this case, that every bit of the work of the laborers used in picking shrimp and

shucking oysters could be done, and often times is done, wholly without reference to canning; that this process is only one of the processes used in changing the seafood from a raw state to a finished product; and that it is always accompanied by the production of two separate and distinct commodities, on one hand, oyster meat and shrimp meat that could be used for canning or for other purposes, and on the other, oyster shells and shrimp hulls, both of which are very valuable as fertilizer and used for many other purposes. After this process is completed some of the shrimp and oysters are canned at other packing plants. In any event, there is a final product when the pickers and shuckers are finished with their work.

In the case of oysters, it is not only a separate and distinct process, but the evidence shows without question that the plant does not come into possession or ownership of the oyster until the process of opening has been completed. After these workers have finished and completed their work in opening these oysters, the oysters are subjected to inspection by the union, and if the price is unsatisfactory to the fishermen, they can then be sold to another factory. (R. 44; Appendix 1, pp. 24 and 40).

And we think the evidence in both the *Donnelly* case, and in the case at Bar, shows it is feasible to transport this meat and can it at another factory, and, therefore, when the work of these laborers is completed, it can be sold elsewhere, and is, at times, the subject of sale and barter between the factories, before being canned or otherwise used.

If anything, the whole record of the case at Bar, and the record on which the opinion of Judge Holmes in the *Donnelly* case was based, shows that the process of shucking oysters and hulling shrimp is a distinct and needed one in order to change the uncleaned and unopened shrimp and oysters into a raw product that afterwards, through different processes, can be canned, quick frozen, or sold cooked and peeled. (R. 22; Appendix 1, p. 25).

We bring to the Court's attention that processing, as used in the Statute is an inclusive word, which embraces all the acts necessary to transfer raw seafood into a commercial product, not limited to any one act or process. It consists of the many processes necessary to create edible seafood. Sec. 13(a) (5) excludes one of these processes, that is, canning, from the exemption; canning by general definition is one process.

The word "canning" has, heretofore, been construed by a number of the Circuit Courts of Appeal, including the second and the fifth. We here submit to the court that the opinion of Judge Holmes in the *Donnelly* case is eminently correct, and the lower court, in the case at Bar, was entirely justified in following this as a precedent, because, not only is this type of labor almost separate and apart from all other types of labor, but it is engaged wholly in a separate, separable, and distinct process.

Respondents have recognized coverage of the act for all employees engaged in canning as defined by the *Donnelly* case and the dictionaries and has paid its said employees accordingly.

We take the liberty of citing the definition of canning from recognized works on the meaning of words in common use in this country:

> Webster's New International Dictionary, Second Edition, Unabridged, p. 387, Can. v.t.; Canned; canning. 1. To put in a can or cans; to preserve by putting in sealed cans or jars.

> Funk and Wagnalls New Standard Dictionary. Canning—The act, process, or business of preserving, fruits, vegetables, or meats, by partial cooking, or other process, and hermetically sealing in tin cans, glass jars," etc.

> In older editions of Webster's Dictionary, the verb "can" is defined as signifying: "To preserve by putting in sealed cans. Canned goods, a general name for fruit, vegetables, meat, or fish, preserved in hermetically sealed cans."

Process is defined in Webster's New International Dictionary, Second Edition, Unabridged, p. 1972, as:

> "To subject to some special process or treatment. Specif.: a. To heat, as fruit with steam under pressure, so as to cook or sterilize. b. To subject (esp. raw material) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking;—in past part. often distinguished from raw. * * *"

In this and other definitions of "processing" we find nothing that is discordant between the two definitions because while processing is a general term, it is also used as applying to some special act.

For instance, in any place in the South, it would be perfectly feasible to operate a cotton gin in connection with an oil reduction plant, but certainly, there would be nothing in common between the process of taking lint from the cotton seed and afterwards, even though it can be done by a direct run from the cotton gin, of pressing the oil from these seeds, thereby turning the seed into oil, and different forms of fertilizer or food. Yet, we cannot imagine that a law which would exempt every act in the procedure and processing of cotton "other than ginning" that would mean everyone engaged in working in the oil reduction process, would be considered as engaged in ginning, simply because one of the processes of the production of a raw material from the field consisted of removing the lint from the seed. By the same reasoning the workers, the subject of this lawsuit, engaged in the picking and opening of shrimp and oysters where the meats of which may afterwards be sent to a separate room or establishment, where every act that is envisioned in the definition of canning takes place, that is, the shrimp and oysters are cleaned, graded, seasoned, inspected, put in cans, cooked and labeled, are not engaged in canning so as to exclude them from the exemption of Sec. 13(a) (5) of the Fair Labor Standards Act.

We are familiar with the fact that it is the duty of the courts to give consideration to the regulations of the Administrator of the Fair Labor Standards Act and to

the Congressional Committee Reports. We are further familiar with the necessity on our part of establishing to the satisfaction of the court that the Congress intended definitely to include the exemption of any general class of workers, but when Congress by the use of words having a common acceptation and meaning creates an exemption general to a whole industry as broad and as far reaching as the exemption being litigated before the court, it becomes the duty of the court to give a reasonable construction to these words used by the Congress.

The reason why this exemption granted under Section 13(a) (5) of the Act is so broad and comprehensive is that there is a vital difference in working conditions between persons engaged in the seafood industry and persons otherwise engaged in industry in our country. For, except in great factories where canning is almost an automatic process from beginning to end, it is impossible to tie down people engaged in the fishing industry to any regular hours of work, and this is a basic reason why the exemption was allowed.

In the case of *Anderson v. Manhattan Lighterage Corp.*, 148 Fed. (2d) 971, the Court struck down the exemption demanded or requested, by persons who were commonly called captains of the lighters. The court however, did make the following pronouncement: "Persuasive also is the further reason behind this exemption, namely, the impracticability of regulating the wages and hours of ordinary seamen in the manner contemplated by the Act . . .".

It is one of our contentions in the case at Bar that it would be wholly impossible to regulate the hours of work and the wages of the laborers who are really the subject of this lawsuit.

In order to understand this, the court must look into the background of these people, as well as the history of the shrimp and oyster industry.

This is not a great industry. We doubt if the entire income in the United States resulting from all types of the shrimp and oyster industry, exclusive of the oysters in Long Island Sound and in New Jersey, would be worth over $30,000,000.00 a year.

Beginning in about 1870, after the oyster beds of Maryland and Virginia were exhausted, there sprung up in the bays, bayous and marsh lands of Mississippi and Louisiana, an industry centered around the canning of oysters.

Certainly, many years before this time oysters were canned in Maryland and Virginia under the name of cove oysters, and about this time a man in Louisiana, named Dunbar, found it possible to can shrimp and these two fish products were developed and came into existence together. The laborers necessary in the whole operation from catching the shrimp and oysters to completing the work of their preservation, came from a sturdy clan of French, Spanish and English fishermen who earned their living from this work.

The younger men found their vocation in fishing for the shrimp and oysters, in carrying out the arduous

labor of operating the vessels, tonging for oysters, following the shrimp schools and bringing their catch into port, sometimes an hour's distance, sometimes two or three day's distance.

And after it was unloaded at the dockside, the second of three types of necessary labor took over and we find that while the older sons of the fishermen assisted in operating the vessels, their wives, mothers, their elderly fathers, and other old relatives commenced the work of preparing the catch for commerce and use.

This work is in a way skillful, just like it takes skill of a kind to hoe cotton or to cut down a tree, but it requires very little education and very little strength and it can be perfectly easy for persons who from their infancy had a knowledge of these products of the sea.

After the oysters were cleaned and inspected, these people continued the process by steaming them to force them open and then from the open oyster shell, the meat was taken. The heads and hulls of shrimp were removed, and later the shrimp meats taken into a room where it was required that the workers have some knowledge of the preservation of food and where it is necessary to turn out a safe, edible product.

In the canning room the oysters and shrimp have to be inspected for dirt, or any foreign matter, which must be removed from the meat. The shrimp meats are cooked in a brine solution; an exact amount of oyster and shrimp placed in cans and the proper amount of brine having the exact amount of salt has to be added to the cans, the cans

have to be weighed and properly hermetically sealed, and when this is done, the meat in the cans has to be further expertly sterilized by steam pressure. After this the cans are cooled, cleaned, labeled, packed in boxes and stored for shipping.

This second process, that of canning, requires careful, skilled attention. It is different in that the first process did not require a technically skilled type of worker. Therefore, over a long period of years the older men, the older women, the housewife, and the elder children who were supplementing the family income, became a separate and distinct type of worker, one engaged in the processing of shrimp and oysters, but not engaged in canning.

It would, therefore, appear that considering the whole of the fishing industry in America, that the persons engaged in picking shrimp and shucking oysters constituted a separate, distinct class. In fact, they are so *sui generis*, you find no one like them in America, or as far as the writer of this brief is concerned, any where else in the world.

They constitute a class that came up because of the need of this local industry and because of their natural love of freedom and willingness to labor that is found among fishing classes of all countries. The evidence in the case at Bar Shows that these people do not work for particular processing plants but move from one processing plant to another and are free to come and go as they please. Some work two, four or eight hours. Housewives work early in the morning, go about their home duties or social obligations, and come back to work. Old men labor for the

number of hours that their meager strength will allow, and the young people, where the law permits, work before and after school hours. (R. 77, Appendix 1, p. 43).

Now, certainly, all of these conditions can change. Shrimp can now be hulled or picked by machinery and it is foreseeable that the same work can be done by machinery in the oyster industry. (R. 77). A class of persons who cannot conform, and would not conform to the Wage and Hour Law would be destroyed; that is, the livelihood of these old, aged, maimed people who now subsidize their grants by the government to the extent that they at least have a decent living and not the meager one that comes from social security or an old age pension, will be lost.

We are aware of the fact that the federal government, under the commerce clause of the Constitution, can direct by industrial legislation the activities of people engaged in interstate commerce, and marshall virtually the whole of the working class of Americans as some other countries, under a different form of government, do by decrees. It is the duty of the courts to so interpret laws as to aid and assist the Congress in carrying out the purpose and intent of those laws, especially when the Congress by the use of common, ordinary understandable English has provided some relief for a named class of persons. However, it is the duty of the courts to look into all of the facts and the effect of the enforcement of the law, to give effect to any helpful provisions in a law releasing certain classes from its coverage and not to ignore the basic philosophic reason for an exemption, and not to follow the whims and desires of a department to compel a man

who works in an exempted class to conform to the regulations governing a non-exempted class.

It has been the plainly expressed purpose of the Labor Department ever since the Fair Labor Standards Act was enacted, to so interpret the exemptions, as to bring under the coverage of the law, every possible person, whether exempted or not exempted. For instance, in the case at Bar, the government is claiming that because the results of the efforts of the seafood workers engaged in opening oysters and hulling shrimp was to produce a product that, by long and intricate processing, became canned food, that thereby this separate, distinct type of worker, having characteristics of no other type of worker in the fishing business or otherwise in the whole of the United States, and having customs and manner of labor not found elsewhere in other businesses, being as they are free to work any number of hours, at any time, on any day, for any processor in the community, having absolute allegiance to no one, but the right to labor for all as it suits their convenience, became a canner of food, and yet, at the same time, time after time, we see the same department taking a different stand. For instance, in the case of *McComb v. Consolidated Fisheries*, 174 F. (2d) 74 and *Waller v. Humphrys*, 133 Fed. (2d) 193 (C. A., 5), the Labor Department was strongly urging that a watchman, although engaged in some of the work of processing food and persons performing necessary duties for other processes of food were not engaged in processing. Now, in this case, they want to say that everyone who works under the roof of a processing plant, where canning is sometimes carried on, is engaged in canning, although there is no more resemblance between an oyster shucker

or a shrimp picker, and the people engaged in the actual canning of these products, than there is between a longshoreman working on a dock and a clean, intelligent office manager who daily computes the extent of their efforts.

And furthermore, we notice this inclination much more strongly in the case of *Davis v. Goodman Lumber Company*, 135 F. (2d) 52, where the business with a total gross of about $350,000.00 a year was engaged almost totally in the local retailing of lumber and its products. However, in doing this, in order to meet some of the needs of its customers, it made certain parts used in manufacturing establishments and only a small amount of these parts were shipped in interstate commerce, yet the Labor Department contended, as to the workers and the foreman who made these parts, although made in the same building with the use of some of the same material, operated by the same firm, was a distinct class of worker engaged in work other than service establishment or a local business selling in intrastate commerce. In other words, the government, in that case contended that two or three men out of hundreds could be lifted from the local exempted employment and brought within the fold of persons coming under the provisions of the Fair Labor Standards Act.

Furthermore, in the recent case of *Tobin v. Blue Channel Corp.*, 198 F. (2d) 245, the government made the same contention and attempted in the above case to enlarge the construction of the meaning of the word "canning" so as to bring a person engaged in other activities leading to canning, within the protection of the Act. We therefore say to the court that there is no consistency in the attitude of the Department of Labor. The Adminis-

trator of the Fair Labor Act does not make the law; he administrates the law. Congress makes it and the courts construe it. While in their constructions the courts will give some consideration to the Administrator's construction of the law, yet it is still bound by the plain obvious meaning of the words used in the law, which gave vitality to the exemption as well as life to the Act.

In *Addison v. Holly Hill Trust Products*, 332 U. S. 607, 617, 64 S. Ct. 1215, 1221, this honorable court in construing a similar exemption under Sec. 13(a) (5) of the Fair Labor Standards Act said: "We should, of course, be faithful to the meaning of a statute, but after all Congress expresses it's meaning by words. . . ." "The natural meaning of words cannot be displaced by reference to difficulties in administration."

It is not the duty of the administrator of this law to disagree with the Congress in his construction, or to attempt to broaden the base of the law so as to become a greater watchman over the working man that he was created by the Act. Yet it is obvious from the whole history of litigation involved in the Fair Labor Standards Act that this is the express purpose of the Labor Department. Certainly, provided we do it in a gentlemanly manner, we have a right in our argument to criticize the activities of the gentlemen who are enforcing this law. We have a right, not only to protect ourselves in our economy so as to prevent our businesses from being destroyed, but also in doing this to consider that which is best for the weak, halt, maimed and blind, who can find in their work the last remaining hope for their useful, worldly existence. These employees can work according

to their custom, free and untrammeled, in the manner of their forefathers, and can combat the economic dangers of this life in their old age with the same stubborn courage that marked their adventure into the hardships and dangers of fishing in their youth. They are human beings, and this litigation is directed against them, not against the respondent, because it may be possible for the economy of the shrimp and oyster business in the South to stand being changed into a wholly automatic or machine operation, but under no applicable rule of wage, hours or manner of work, can these poor people qualify under the regulations of the Administrator of the Fair Labor Standards Act.

All the way through this litigation in its briefs and in its arguments before the court, the petitioner has been urging that the courts adopt the rule announced in *Phillips Co. v. Walling*, 324 U. S. 490, and "narrowly" construe the exemptions granted. The Labor Department's construction of this word "narrow" would be synonymous with crush or destroy the exemption granted. They would have the exclusion "(other than canning)" grow to such proportions that it would gobble up the exception "processing" it purportedly limited. In other words, the construction of the decision cited above, and certainly the court meant no such construction, was that the court should be used to destroy a right, privilege or license granted by the Congress. Certainly, the word "narrowly" construed does not mean that it becomes so narrow that the exemption is destroyed. For a river a mile wide can be narrow in comparison with a Gulf or Bay, and a Gulf or Bay can be narrow in comparison with an ocean, or a road of

1920 can be narrow when compared with the same road made in 1950.

Now, all the court meant, as we believe, was that the court would not broaden the scope of the right given where created by Congressional exemption. It did not mean that it would not give full effect to the plain meaning of the English words used by the Congress in writing the law. In order to uphold its argument for narrow construction, the appellant quotes the following part of the Conference Report. We quote: "Canning" includes "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers".

The language used in this part of the report is almost identically the language used by Judge Holmes in the *Donnelly* case, and his logical reasoning that this did not include the separate process or operation of reducing the raw products of the sea to separate parts, one of which could be used for the purpose of canning, is irrefutable. For instance, and we quote this case, "Canning includes * * * every other operation performed necessarily on the products before they are placed in bottles, cans or other containers." Now does not the record show that these preparatory operations for canning are washing, grading, cooking, inspecting, weighing, seasoning and so forth, before they are placed in bottles, cans or other containers? Certainly it does. And these operations are entirely separate and distinct from the operation of the initial process of steaming and shucking the oysters and peeling the shrimp. Everybody on the ship is engaged in a common purpose, that is carrying the vessel and its cargo

or passengers safely from one port to another port, yet if you were to construe the individual efforts of the workers of the vessel, you would find nothing in common between the labor of the man who worked as a stoker and the labor of a man who cooked the food that fed and nourished the others engaged in this nautical operation.

For instance, in *Anderson v. Manhattan Lighterage*, 148 Fed. (2d) 971, Judge Clark had under consideration the claim that captains of non-self-propelled barges were seamen. It would appear from the evidence that the men worked on the barges, they stored cargo on the barges, they trimmed this cargo, they regulated the amount of cargo, and they made trips from place to place on the barges, BUT THEY DID NOT PERFORM THE ORDINARY DUTIES OF SEAMEN, and even though they were traveling on the sea at times in charge of a vessel that used the waters of the seas and bays, this did not turn them into seamen. Certainly in that case, the Labor Department was urging that the men were not seamen, even though they performed many, many more duties in the nature of the duties of a man of the sea than the oyster shuckers and shrimp pickers performed in the nature of the duties of a canner of food. And in the very nature of the work of these people, they are not engaged at any time exclusively in the canning of food. Their work was preparatory to the use of the raw product in many other forms, such as freezing, cooking or canning and their engaging in this preparatory work, which has set them apart as a class for over seventy-five years, separate and distinct from people engaged in canning operations, does not change the nature of their employment and make them engaged in a process of canning.

When the law was considered by the Congress and passed, it was understood that shrimp and oysters and other seafoods are subject to varying and many processes and this exemption was qualified only by the words "other than canning". In other words, every separate and distinct process which subjected aquatic life to being turned into useful food was exempted (other than canning). Now, what does it mean by "other than canning"? It means that separate and distinct process of canning, which has a historic meaning and simple meaning as shown by all the books devoted to the construction of words and as commercially considered by persons engaged in the food industry.

E. SIMILARITY OR NECESSITY OF WORK IN A FIELD OF PRODUCTION OR ACTIVITY DOES NOT REQUIRE A CONCLUSION OF IDENTITY.

In *Farmers' Reservoir and Irrigation Co. v. McComb*, 337 U. S. 755, 759, 69 S. Ct. 1274, 1277, where this honorable Court was discussing the agricultural exemption claimed by an irrigation company in Colorado, and certainly in that dry country irrigation projects are the backbone of agriculture which could not exist without that type of water supply, it was decided that the company's function was necessary to agricultural production, but still was not identical with it and was not agriculture. Here, shucking, hulling or picking are necessary to canning, but are not identical with it. Such activity is truly a process of its own just as canning is a process. In this case, the fact that each is a process does not create an equality or an identity. Each has a separate identity and a separate function.

It would also appear that in a number of cases of which *Walling v. W. D. Haden Company*, 153 Fed. (2d) 1953, (Fifth Circuit) a number of the Circuit Courts of Appeal, as well as other appellate courts, have decided that irrespective of the fact that men labor on vessels resting upon the surface of the sea, kept watch, held various duties on these vessels, that if these duties did not conform to the generally known duties of seamen, they would not be considered seamen under the provisions of the Fair Labor Standards Act.

In other words, the Act shows that one would not be judged by any work he engages in, but on the contrary, would be judged by the type of work he engages in, and in arriving at this decision, of necessity, the Courts had reason to examine the dictionaries and other books of reference to construe the meaning of the word "seamen", and then to this word they gave an utterly strict construction in order to carry out, as each court expressed itself, "the will of Congress", which was to the effect "the Fair Labor Standards Act was designed to extend the frontiers of social progress by assuring to all able-bodied men and women, a fair day's pay for a fair day's work". *Phillips Co. v. Walling*, 324 U. S. 490, 493, 65 Ct. Repts. 807, 808.

In the *Haden* case, *supra*, the court reasoned as follows: "the words of the exemption are 'employees *employed as seamen*'. The italicized words mean something. They are not mere tautology."

Now we are of the very reasonable opinion that Congress acted within its constitutional power in granting the broad exemption which exempted our employees

from the purpose of the Act, and their association with other work did not determine whether or not persons engaged in a particular occupation were exempted, but the determining factor would be the particular nature of the work itself.

This was illustrated most strongly in the case of *10 East 40th Street Bldg., Inc., v. Callus, et al.*, 325 U. S. 578, 65 S. Ct. 1227, 1229, in which all of the employees of a building housing concerns actively engaged in Interstate Commerce to about forty-five percent of its capacity, requested that they be included among the persons protected by the provision of the Fair Labor Standards Act. This right was denied them and in the opinion of Mr. Justice Frankfurter, we find the following: "The series of cases in which we have had to decide when employees are engaged in an occupation necessary to the production of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act."

Therefore, we come again to the consideration of the words "processing (other than canning)". In doing this we have to agree with Judge Holmes in the *Donnelly* case, *supra*, for the reason that the logical expression in his opinion is founded upon not only the meaning of the words,

but on a rule of common sense, for as Judge Holmes says, "if picking shrimp and shucking oysters are not exempted, what are the processes other than canning that were in the legislative mind? Catching, cultivating, curing, storing, freezing and marketing, are without qualification specifically exempted from the wages and hours law. What, then, we repeat, are the processes (other than canning) that the amendment intended to exclude from the exemptions if the actual canning retroactively embraced everything previously done to the product except catching, curing, storing, freezing, and marketing?"

In other words, to our simple minds, Congress intended in the plain language that was in the first statute, as well as the amended statute, to exempt processing of aquatic foods.

Now what is this process that is to be exempted if the only process preceding canning, is to be included in canning?

Certainly, this would destroy the intention of a Congressional exemption and while we are willing to admit that the courts have gone very far in construing this act to include every laborer that could be effected thereby, yet this liberality will not include the oyster and shrimp pickers in this case who are not engaged in canning. It will take a rewriting of the law which under the provisions of the Constitution, rests solely upon the Congress.

Furthermore, in the opinion of *Donnelly, et al., v. Mavar Shrimp and Oyster Company, et al.*, above referred to, Judge Holmes included in his opinion the following:

> "A corn shucker is not a miller, and a shrimp picker is not engaged in canning shrimp any more than a corn shucker is engaged in canning corn. The least that can be said is that the processes are separable; and that the Act so contemplated is indicated by retaining the exemption as to processes other than canning."

It would be a far-fetched theory for one to advocate that a person who does the shucking of an ear of corn, even if done in the same building where afterwards the corn is canned, is engaged in canning if all the other processes with reference to corn were exempted, and certainly it would appear that it was the intent of Congress that all of the processes other than canning were to be exempted. This is clearly shown by the fact that Congress met four times since the *Donnelly* case was decided without amending this part of the Fair Labor Standards Act although each time it had the opportunity to amend the Act if it so desired. Congressional committees are always investigating the coverage of this far-reaching Act because it is the subject of political controversy at all times.

Now as to the liberal construction to be given by the Courts to the Fair Labor Standards Act, we must say that many times these statements have been lifted out of text so as not to express the real purpose and meaning of the Court in using this expression, but on the contrary, to attempt to bring into existence a fixed rule of law, like the law of the Medes and Persians that couldn't be changed, as if to admonish the court to exclude from any exemption

and to place under the coverage of the law, any laborer engaged in Interstate Commerce.

Most assuredly this is not true for it is the duty of the court to give expression, if possible, to every part of an Act of Congress and to give to each word used in such enactment the ordinary, usual meaning of this word as construed by those persons having knowledge of the meaning of the English language.

We again quote from the opinion of Judge Holmes in the *Donnelly* case:

> "The position and punctuation of clause (5) in paragraph (a) of Sec. 213, Title 29, indicate that the parenthetical words (other than canning) modify only the preceding word 'processing' and not the words 'marketing, freezing, curing, storing, or distributing.' Curing means to prepare for preservation or permanent keeping; to preserve as to cure beef or fish. See Webster's Dictionary. We must give full effect to all the words used by the Congress; to do this means that preparing shrimp or oysters for preservation or permanent keeping is exempted from the provisions of both Sections 206 and 207 of Title 29. These appellants are not engaged in canning; they do not work in the canning room; their work is frequently done without any intention on the part of their employer to can the articles that are being processed; they are engaged in a process involving shrimp and oysters that is distinct from, not necessarily related to, canning. Cochrane v. Deener, 94 U. S. 780-788,

24 L. Ed. 139; Waldman v. Swanfeldt, 9 Cir., 66 F. (2d) 294, 295; Henry v. Markesan State Bank, 8 Cir., 68 F. (2d) 554, 557; Waller v. Humphrys, et ux., 5 Cir., 174 F. (2d) 74; Cincinnati Soap Company v. United States, D. C., 22 F. Supp. 141, 143; State v. Pacific American Fisheries, 73 Wash. 37, P. 452-54."

Certainly, this court in the *10 East 40th Street Bldg., v. Callus, et al.*, quoted above, has held that the court is not bound to any hard and fast rule in determining by exact measurement the class of people who come within the meaning of the Fair Labor Standards Act.

In *Kirschbaum v. Walling*, 316 U. S. 523, and in *Borden Co. v. Borello*, 325 U. S. 679, involving persons engaged in the operation of a building used in Interstate Commerce, this Court held the exact opposite of its findings in the *10 East 40th Street Bldg.*, case, *supra.* The reason for these findings were that the facts were different in these various cases, and therefore the court construed the law in the light of the facts before it and would not narrowly construe the meaning of a well known word.

It stands without contradiction, that the Congress intended to exempt every single employee in the seafood industry up to and including the time when goods were ready for shipment except persons engaged in canning. These persons who pick shrimp and shuck oysters are engaged in processing, (other than canning), even though this process may precede the process of canning. This process of picking and shucking is separate, distinct and insofar as the law is concerned, not related to any other

process. Certainly the employees of the respondents, who are the subject matter of this lawsuit, are not engaged in canning, but engaged in an occupation that is one of its kind in the United States, and which they carry on absolutely without reference to canning. They open oysters and pick shrimp for a multitude of purposes, working in the same building under the same rules, carrying on the same customs, working one day for one man and another day for another man, and yet Plaintiff contends that suddenly, if this work precedes the canning of the goods, because of its proximity to the process of canning, it takes on the nature of canning. We cannot so conclude.

CONCLUSION.

We, therefore, respectfully submit to the court that the opinion of the eminent Judge of the court below and the judgment in the *Donnelly* case, and the judgment of the Fifth Circuit in the case at Bar, should be affirmed.

Respectfully submitted,

W. L. GUICE,
Attorney for Myrtle Grove Packing Company, Respondent.

CHALIN O. PEREZ,
JACOB D. GUICE,
Of Counsel.

APPENDIX 1

Testimony in Donnelly v. Mavar Shrimp & Oyster Co., 190 Federal (2d) 409.

(21)

Mr. Nick Mavar, a witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. Your name is Nick Mavar?

A. Yes, Sir.

Q. How old are you, Mr. Mavar?

(22)

A. I am 36.

Q. You are a native of Biloxi, Mississippi?

A. Yes, Sir.

Q. You are employed by the plaintiff, Mavar Shrimp and Oyster Company, Inc.?

A. Yes, Sir.

Q. How long have you been with them?

A. Fifteen years.

Q. Fifteen years. I think you attended the University of Mississippi, intending to be a lawyer, is that right?

A. Well, briefly, yes.

Q. Then you decided to go into this business with your people?

A. Yes.

Q. Now, prior to the time you entered into the actual work in the shrimp and oyster business, were you because of the occupation of your father and mother, familiar with, acquainted with the shrimp and oyster business in Biloxi?

A. Yes.

Q. Were you acquainted with the original plant here, the one called Dunbar-Dukate Company?

A. Yes, Sir.

Q. And acquainted, likewise, to the operation of the Biloxi Canning and Packing Company?

A. Yes, Sir.

Q. Julian and other operating parties in Louisiana and Mississippi?

A. Yes, Sir.

Q. Now, before the Court today, Mr. Mavar, is whether or not the shucking of oysters, that is, the operation beginning at the pier and ending at the pay-off window, if that is a necessary part of the canning of oysters. Do you know anything about that—I mean, are you acquainted with that?

(23)

A. Yes, sir, that is a part of the canning.

Q. Are you acquainted with it?

A. Oh, yes, sir.

Q. Are you acquainted with these two operations as carried on by the Mavar Shrimp and Oyster Company and Williams Packing and Navigation Company at Biloxi?

A. Yes.

Q. Now, is the operation as conducted by these two factories practically the same now as the operation conducted by the ordinarily average shrimp and oyster processing and canning plant in Louisiana and Mississippi?

A. Yes, sir, that's right.

Q. Now I will ask you if, from your knowledge of this business, gained over your fifteen years experience in it, is the essential processes shown in File No. 1 here entitled pictures 1 to 9, showing the process of steaming and removing the oyster meat from the shell, is that operation separate and distinct from the packing of oyster meat in cans?

Defendants objected for the reason the question called for a conclusion of the witness.

Objection overruled.

A. Yes.

Q. State whether or not in carrying on the business of canning plants if it is perfectly feasible and workable to process this oyster meat, we will say at Lakeshore, Louisiana, and canning it at Biloxi?

A. Sure.

Q. Has that been done?

A. Yes.

(24)

Q. It is done by the original and largest oyster factory, Dunbar-Dukate?

A. Yes.

Q. State whether or not in the past, or under adverse and other circumstances which made it most feasible, if Mr. Taultavaul, who was with the Biloxi Canning Factory, opened oysters in Louisiana and canned them in Biloxi?

A. Yes, sir.

Q. Mr. Mavar, when the boat, which catches these oysters on the reefs of Mississippi or Louisiana, ties up at the wharf of your plant or the Williams Packing and Navigation Company plant, to whom do the oysters in the hold of that boat belong?

A. The fishermen.

Q. The fishermen who caught them?

A. Yes.

Q. Then, by the process shown in File No. 1, they are carried up on the pier, washed, placed in cars, steamed and cooked, opened by the Laborers who are defendants in this case, and then brought to a window to be weighed so that the laborers, who are defendants in this case, and persons similarly employed, may secure their pay. When they are brought to that window, who do they belong to?

A. The fishermen.

Q. In other words, the title to those oysters—

Defendants objected to counsel leading the witness.

Q. Well, I will ask you this: State whether or not, if the title of those oysters ever passes to the canning company until they are sold at that window?

A. That's where we buy them.

(25)

Q. Now, when you buy them there, state whether or not it would be perfectly feasible, with an average cooling temperature, to carry them anywhere along the gulf coast you desire to can them?

A. Sure.

Q. Is it a fact that in many instances in the past that one canner of oysters, in his canning plant, would can oysters for another person in the oyster business, that were processed originally in his shucking shed?

A. That has been done.

Q. Now we get to the question of shrimp. Most of the factories here handle both shrimp and oysters?

A. Yes.

Q. The laborers who are named defendants in the proceedings before the Court are engaged both in the shucking of oysters and in the cleaning of shrimp?

A. Yes.

Q. Now, will you tell the Court in what different ways shrimp are processed after they come in from the boat?

A. Well, they can be canned, they can be cooked and peeled and packed in cans hermetically sealed, frozen raw as peeled meat, they can be headless, they can be processed what we call fan tails, which are packed for ready frying.

Q. Now, when the boat, that is commonly called a trawl boat, goes into the sound, gulf and inlands, catch these shrimp, do you know whether the catch they bring back is going to be canned or cooked and sold in containers?

A. No, sir.

Q. Or frozen and sold in containers?

A. No, sir.

Q. When the shrimp come to the wharf do you know?

(26)

A. We don't know until we get down in the morning.

Q. After the shrimp are completely hulled, as shown by the last picture in File No. 3, which I hand you here, can they still be used for more purposes than being canned?

A. Sure.

Q. And they are so used?

A. Yes, Sir.

Q. Now, so that the Court may be informed on the subject of the type of your labor, will you tell the Court how you pay, that is, on what basis the labor who works in the processing

plant carrying out the first process of cooking and opening oysters and of washing and cleaning shrimp?

A. Piece work.

Q. What is that.

A. Piece work.

Q. How much do you pay per ship load for securing the oyster meat from the shells after the oysters have been steamed?

A. 18 cents a pound.

Q. Now, in the plant, do you know about what would be the average hourly wage prevailing among the various people who work there?

A. You mean average all the way through?

Q. About what percentage would make less than 75¢ per hour?

A. Pretty close to half.

Q. Then above 75¢ per hour, how high does the range go?

A. Some go as high as $2.00.

Q. But over half of them are below 75¢?

A. Yes.

(27)

Q. Would it be economy, would it be possible at this time to equalize those wages so that the high one would be willing to get down on a basis with the lower one?

A. I don't think it would be possible.

Q. If you had to raise the lower one to the higher scale, to 75¢ an hour, would it be possible for you to continue?

A. Couldn't stay in business.

Q. As stated in the bill of complaint that the prices paid to the union for opening oysters and cleaning shrimp during the past sixteen or seventeen years, has risen about one thousand percent. Is that correct?

A. It has risen quite a bit, but I don't imagine it has gone that high.

Q. Now, Mr. Mavar, in conclusion, you know what canning is?

A. Yes, sir.

Q. You have been all over the country?

A. Yes.

Q. You have been in all kinds of canning plants?

A. Yes, sir.

Q. And you are experienced in cans hermetically sealed?

A. Yes.

Q. At various, in different plants?

A. Yes, sir.

Q. And under different conditions?

A. Yes.

Q. Is there any direct or necessary relation between the first process here of cooking and packing the meat of oysters and the canning of them?

A. No, sir.

Q. Would that apply likewise to shrimp?
A. Yes, sir.

(28)

Cross-Examination

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Mr. Mavar, what office do you hold in connection with the Mavar Shrimp and Oyster Company; are you an officer of the corporation?
A. No, sir, I am an employee.

Q. In what capacity do you represent the Mavar Shrimp and Oyster Company at their plant at Biloxi; do you have a title?
A. Well, no, not specifically. I am a second lieutenant, or superintendent.

Q. You act as superintendent of the plant?
A. Yes, sir.

Q. Your organization has a kind of fleet of boats; that's correct, isn't it?
A. Yes.

Q. How many boats do you have, use to go in the waters of the Mississippi Sound, Gulf of Mexico, to secure shrimp and oysters?
A. About thirty-five.

Q. Do you buy any oysters from any other boats other than your own fleet?
A. Occasionally we do.

Q. You have what is known as a freighter; that is what is known as a lager?
A. Oh, yes, we buy from all.

Q. You buy from who you can; is that right?
A. Yes.

Q. On the open market?
A. Yes.

Q. I want to ask whether the prices of oysters and shrimp are fixed by a union?
A. Yes.

Q. You have a Gulf Coast Fish and Shrimpers and Oystermen Union?

(29)

A. Yes.

Q. And you pay so much a barrel and so much for certain grades and classes?
A. So much a barrel for shrimp and oysters we buy by the pound.

Q. Do you buy any of these oysters before they are brought into Biloxi to your plant?
A. From the fishermen?

Q. Yes.
A. No.

Q. You don't buy them until they are brought to the plant?
A. No.

Q. They are unloaded on cars and then they bring them into the plant. Is that right?
A. Yes, sir.

Q. What I want to know is when does the oysterman lose his title, or sell his interest in the

oysters, and when do you all buy. At what stage in the proceedings—these pictures offered by your lawyers, pictures numbers one to nine from Exhibit No. 1 of the plaintiff that are in this yellow envelope marked Exhibit No. 1, and nine pictures numbered one to nine?

A. Yes, sir.

Q. And one I hold in my hand, number 9, which has this notation—"Oyster shucker having shucked meats weighed up in order to arrive at the amount earned."

A. Yes, sir.

Q. The oyster shucker shucked oysters from the shell and brought them to the window?

A. Yes.

Q. Who did these oysters belong to?

A. The fishermen that caught them.

(30)

Q. They are brought into your factory?

A. Yes.

Q. And when they get out of the shells they get in a large can the shucker is holding in front of the scales and being weighed?

A. Yes.

Q. After they are weighed you all buy them?

A. Yes.

Q. You pay them how much a pound after they are taken from the shell?

A. They run 40 and 45 cents a pound.

Q. Who do you pay for these?
A. The fishermen that catch them.

Q. That the captain of the boat?
A. Yes.

Q. That captain operates a boat in most cases for your organization?
A. That's right.

Q. And he operates with other men besides himself. How many other men?
A. Three to five.

Q. Each man receives a share—assuming they make $100.00 for oysters and there are four men and the boat, that would mean five shares, would it not?
A. Yes.

Q. Each would get $20.00 out of that?
A. Yes.

Q. At that stage, when you buy these oysters and you pay the captains of the boats and pay so much a pound for oysters, he in turn goes back and distributes this money to the members of his boat?
A. Yes.

Q. And he also pays your organization a share for the boat?
A. Yes.

(31)

Q. These women that have to shuck these oysters, they are paid by whom, Mr. Mavar; at that time, this woman in picture No. 9, she gets how much a pound for shucking?

A. 18¢ a pound.

Q. Who pays her?

A. The company.

Q. Do you pay her before you buy them, or after?

A. At the same time.

Q. At the same time, did this woman shucker have any arrangement with the captain of the boat about shucking of them; does he have anything to say about that?

A. Yes.

Q. Does that woman have a representative in your office all the time?

A. They are right at the scale.

Q. The defendants you named in this case, starting with Josephine Donnelley, all these ladies belong to a union also?

A. Yes, sir.

Q. Do they have their representative all the time in the factory to see they are taken care of, their interest is taken care of?

A. Yes.

Q. You don't pay for any of the oysters until after they get at that window, come through that window and are weighed up?

A. No.

Q. And each boat load is brought to the factory, shucked, and goes through the processes of cleaning, preparing them for shucking, and after they are shucked then they are paid for and not before?

A. That's right.

Q. And you have that arrangement in working with the union?

(32)

A. That's right.

Q. In the old days, or prior to this arrangement, the factories bought at so much a barrel taken off the boats, loaded them in cars, but through the factory and union organization, both men and women, they got away from that, it being the scheme and desire to have them bring a better grade oyster into the plant?

A. Yes.

Q. And they get larger prices for oysters. Is that right?

A. Yes.

Q. Mr. Mavar, with reference to the manner in which the shrimp are handled. I want to refer to the exhibit, please sir, referred to as Exhibit No. 4, marked File No. 4, which has pictures one to 10 inclusive, I am now addressing myself to Plaintiff's Exhibit No. 4; picture No. 1 shows the proceedings of the shrimp in the early stages; is that right?

A. Yes.

Q. And No. 2 shows where they are being received and placed on tank for cooking?

A. Yes.

Q. No. 3 shows the shrimp being transported on cooling and inspection belt?

A. Yes.

Q. And No. 4 is the same shrimp as shown on picture No. 3, being cooled and graded for size?

A. Yes.

Q. And picture No. 5 shows graded shrimp being staked for use later on the picking table. Is that correct?

A. Yes, sir.

Q. And picture No. 6 shows the same shrimp as picture No. 5 being placed in cans preparatory to being sealed?

A. Yes.

(33)

Q. No. 7 shows the same shrimp after the cans are filled with water traveling down picking line to be sealed, and shows the canning machine which hermetically seals the cans?

A. Yes.

Q. Picture No. 8 shows the canned shrimp being placed in baskets preparatory to sterilization?

A. Yes.

Q. No. 9 shows basket being dropped in kettle or drum for the purpose of being sterilized for 13 minutes at 250 degrees Fahrenheit?

A. Yes.

Q. And No. 10 shows the sealed and sterilized shrimp prepared for shipment?

A. Yes.

Q. What I wanted to ask you, Mr. Mavar, the same arrangement with reference to oysters; is also true with reference to shrimp, so far as operation of the fleet of boats is concerned, where they go out in the Gulf waters to catch shrimp?

A. They go out to catch shrimp.

Q. And they work on shares the same as they do with oysters?

A. Yes.

Q. And you have three or four large boats you refer to as freighters?

A. Yes.

Q. These men working on the small boats catch shrimp and bring them to the freighter. Is that right?

A. Right.

Q. And unload on the freighter to be weighed?

A. Yes.

Q. What do they get to show that they own the shrimp?

A. Get a receipt from the captain of the freight boat.

(34)

Q. Does he also catch shrimp?

A. Yes.

Q. When the small boats brings shrimp to the freighter that later brings them to the factory, what process with reference to unloading, handling and selling takes place; how is it done, I want to know that; is the shrimp unloaded on the docks, at the boat?

A. Yes.

Q. Into what?

A. Into a tank on the end of the pier. The ice is removed.

Q. Is that assortment or shipment, group or batch of shrimp brought in by a boat named by a freighter named John M, and the John M. brings a batch of shrimp, are those shrimps set aside separate from all other shrimp?

A. They are all mixed up.

Q. But say the captain off the . . . has a receipt that he owns 500 pounds of shrimp?

A. That's right, they have a receipt for their shrimp.

Q. As set out in pictures one to ten in Exhibit No. 4, when is it you buy the shrimp, when is it that they become your property?

A. We buy them when we unload them at the factory.

Q. Then your arrangement to buy shrimp is a little different than that to buy oysters?

A. Yes.

Q. Then when they are picked they belong to you?

A. Yes.

Q. They belong to you when you unload them at the pier; is that right?

A. Yes.

(35)

Q. Getting down to the actual work of these people, the time it takes to shuck oysters and pick shrimp. These shrimp pickers that have to pick shrimp, they pick them in your factory after they go through the process of boiling and cooking?

A. They pick them before.

Q. Don't you have some shrimp picked after they are cooked?

A. They are picked out and graded.

Q. You take the hulls off of them before they are ever cooked?

A. Yes.

Q. That is true of all shrimp in your factory, and of other factories operating on the same basis?

A. Yes.

Q. After the shrimp are picked by these employees, in the picking department, Mr. Mavar, they are classified and placed in three or four different classifications, and you sometimes cook the shrimp and seal them as soon as they are cooked?

A. Yes.

Q. The other shrimp are frozen after they are cooked?

A. Yes.

Q. Those frozen are not put in little cans and sealed?

A. No.

Q. Most anybody comes in to you and gets them and carry them off to retail trade?

A. Right.

Q. Where they are canned and sold as in these pictures, they are put in cans, hermetically sealed, and later put in containers of either 24 or 48 cans to the container?

A. Yes.

(36)

Q. Of different sizes and weights?

A. Yes.

Q. And you then ship them off to different markets throughout the country?

A. Yes.

Q. Is it your contention that these people picking shrimp, the defendants here, that they don't participate in any type of work classifying them as engaged in the canning business?

A. That is right.

Q. They don't have anything to do with canning?

A. No.

Q. At the time they pick them, or at the time they pick anything, do you or anyone else know what is going to be done with that at that time?

A. No.

Q. You might get an order for a 1000 pounds of shrimp and sell them?
A. Right.

Q. Those shrimp are in cans?
A. No.

Q. What about the shrimp that are in cans?
A. What do you mean?

Q. Do they have anything to do with the canning of those shrimp?
A. No.

Q. How much time from the time the shrimp are picked; how do you pay them off, how often; do they get paid off every day?
A. We pay them for the hulls.

Q. Whatever system you use. Assuming they have 20 pounds of hulls, they get paid how much per pound?
A. 4¢ per pound.

Q. Those 20 pounds of hulls are weighed and they get their 80¢ right then?

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A. Yes.

Q. And if she wants to go home she can go home. Is that right?
A. Yes.

Q. Are any hours set when a picker must start or when she must stop by you all?
A. Not as far as we are concerned.

Q. It is all done on a basis of so much a pound for the amount that picker picks. Is that right?

A. Right.

Q. With reference to when pickers are through and retire, leave the plant, are those shrimp canned that same day?

A. Yes.

Q. Some may be canned and some may be frozen and some shipped away right then?

A. Yes.

Q. But the pickers, you contend, have nothing to do with the process of canning?

A. No.

Q. It is not your contention that those who come in under the canning process are not entitled to come under the wage and hour law?

A. Repeat that, please.

Q. Under the benefits of the wage and hour law?

By Mr. Guice:

I will say this: That we don't contend that people employed in the cannery are exempt by provisions of law. They are covered.

By the Court:

For the record, gentlemen. As I understand it, from the oral statement, you have other witnesses who would testify to substantially the same thing as this witness.

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By Mr. Guice:

That is right, but it would be substantially the same testimony.

By the Court:

I can't see no necessity in putting the other witnesses on.

The Plaintiffs rested.

MRS. GEORGE DUVALL, a witness called on behalf of the Defendants, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. State your name, please.
A. Mrs. George Duvall.

Q. You are Mrs. George Duvall?
A. That's right.

Q. You live in Biloxi?
A. That's right.

Q. Your business at this time is what, Mrs. Duvall?
A. President of the Seafood Workers Association.

Q. Your home office, principal place of business is located in Biloxi, Mississippi?
A. That's right.

Q. How long have you been president of this organization, Mrs. Duvall?
A. Fifteen years.

Q. You know all the defendants in this case?
A. Yes.

Q. They are members of your organization?
A. Yes.

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Q. And you know them personally?
A. That's right.

Q. I want to ask you if you, with several members of the defendants in this case came to see me?
A. That's right.

Q. I want to ask you if, in your work as president of your organization, you are in contact with members of the union?
A. Every day.

Q. You heard the testimony given by Mr. Nick Mavar, put on as a witness by the plaintiffs; you were in the Court room when he testified?
A. Yes.

Q. You heard all his testimony?
A. That's right.

Q. Now, with reference to the manner in which the oysters are brought into factories, in any factory, did he correctly state that?
A. Right.

Q. The manner in which the oysters are shucked by the shuckers. You heard his testimony, did he correctly detail just exactly like the factory operates?

A. He correctly detailed it.

Q. I want to know from you, in your work you go into all these factories?

A. Every day.

Q. You observe your workers, your members of your organization?

A. That's right.

Q. You have a chance to discuss with them your problems?

A. That is true.

Q. And examine conditions as to health, sanitation, whether they are clean, properly maintained. That part of your job to see the members of your organization have clean wholesome places in which to work?

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A. Yes.

Q. So you have a chance to see the conditions under which they work?

A. I don't have anything to do with what the conditions are, but all our plants are modern.

Q. If you found they were not sanitary you would take that up?

A. I would speak about it and it would be corrected.

Q. When these oysters are shucked and brought to the window and weighed—you saw the picture No. 9 in this case where a woman brought oysters and dumped them on the scales to be weighed—it was testified that the oysters, up until that time, belonged to the fishermen. Is that correct?

A. That is a fact.

Q. After they are weighed then the boatmen are paid for whatever amount they bring to the factory. Is that correct?

A. Correct.

Q. You heard me ask Mr. Mavar about if there were four members of a crew and the boat getting one share. Is that correct?

A. That is right.

Q. You haven't done anything but be president of this organization for fifteen years?

A. Right.

Q. That's all you have done?

A. Right.

Q. And you are thoroughly familiar with reference to conditions of all factories?

A. I am.

Q. Do you know that some of the shrimp, when they are brought in, some of them are cooked and sold at the factory after they have been picked and cooked, and you know that some are

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frozen and some are canned?

A. Yes. May I make a statement?

Q. Yes.

A. When those shrimp come in off the boats and put on the table for those pickers to pick, I have some members—I am quite sure I am telling the truth—if you asked one of the members if they were going to be picked and processed they don't know. For instance, they are large shrimp, if there are large shrimp among them they pick the heads off and throw them in a trough of running water, but if they are medium shrimp the heads are picked off and are thrown into a drum. Nobody knows that. I was a picker before I was president of the union and I saw thousands and thousands of pounds of cooked meat pulled out and put in one gallon cans that was not processed product. Therefore, you don't actually know whether it is going to be processed or not.

Q. To clarify your statement. When they are put in cans you don't mean put in large cans and sealed and processed?

A. No.

Q. The size of the can would be how large; did you say a gallon?

A. A gallon can and put it in cold storage.

Q. They were just put in a gallon can for convenience?

A. Yes. They have orders for that kind of shrimp.

Q. Then when they get orders the trucks would back up and take them away. Is that right?

A. Right.

Q. But they were not processed?

A. No. You don't actually know what is going to happen until you get to that table. All our members are paid in the back by the hour.

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Q. Could any lady engaged in the picking of shrimp, could they or have they any way of knowing that the shrimp they pick would be frozen packed, or put in gallon cans?

A. No. They don't have any way of knowing that. Like I say, nobody knows that until they are put on the packers table.

Q. When the pickers get through with the work she performs as a shrimp picker they leave, don't have anything to do with canning or processing?

A. Not a thing.

Q. They work in a separate department?

A. That's right. The piece-worker work is in a separate department. They have no reason to go into the packing rooms where goods is being put up at all.

Q. On this wage involved in this case, can you tell us what the average pay of a person engaged in picking shrimp or shucking oysters is?

A. We have some of our workers who are very very slow; they don't average much. Then we have some who will average 75¢ and a little better. Then we have some who average $2.00 or $2.25 an hour.

Q. That depends on the ability of the picker or the shucker to turn out a great deal more than others?

A. That is right.

Q. In other words, some can put out more work than others?

A. You have some folks who never get any faster, just pick at the same speed. We have some that make fast workers and make good money out of it.

Q. You have some that are not very fast, did you say, some that will come and work a day and won't make half as much as a fast worker?

A. That's true.

Q. If all were put on a basis of 75¢ an hour would the business of the factory be so that everybody could go on a profitable basis?

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A. I don't think so. The people who work fast wouldn't be willing to work alongside folks so slow. You would have dissatisfaction and that wouldn't work.

Q. Have you discussed this matter with your members?

A. Repeatedly. The fast workers are going to slow down if they are not going to get any more than the other people that didn't earn it is getting. They are not going to work and let them get it and they not.

Q. Let me ask you this. The average shrimp picker and oyster shucker, as we are referring to, would make the one woman picking shrimp that makes 75¢ an hour—about how many pounds of shrimp do they have to pick to make 75¢ an hour, pay—4¢ a pound; if they pick 20 pounds of shrimp they would make 80¢ an hour?

A. Right.

Q. If you paid them all the same, 75¢ an hour, many of them would only pick about 10 pounds an hour?

A. Right.

Q. Then you would be paid 75¢ an hour for only 40¢ an hour?

A. That's right. And, may I say this, that our workers don't want that. They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they please. They can work three or four hours and go on home, and they thank God every night of their life that they were permitted to earn that day. They are satisfied and don't expect to make as much as the fast workers. Everybody is satisfied with what they can earn.

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Q. These older people, when they pick shrimp and shuck oysters, are they earning 75¢ an hour on the basis of 4¢ a pound?

A. Some of them may, but very few.

Q. And there are some that could?

A. That's right.

Q. Those that you know who cannot do that, would they be interested in trying to make the factory pay of 75¢ an hour?

A. Frankly, under the law, and they know that is what the law is, they would expect it, if it came under the provision of the wage and hour act. Our members contend they don't come under that law because that is all piece work.

Q. State if you could successfully operate a factory and pay 75¢ an hour instead of piece work?

A. I am not familiar with that, but I don't see how they could.

Cross-Examination.

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. About how long has the Union been in existence, what you call the shrimpers union?

A. Miss Kolosky could answer that.

Q. About twenty-five years, during the time you have served and others who have served with you, the earning powers have been advanced around a thousand percent?

A. Yes.

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MRS. FLORENCE POWLOSKI, a witness called on behalf of the Defendants, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Please state your name.
A. Florence Powloski.

Q. You live in Biloxi, Mississippi?
A. Yes.

Q. How long have you lived here?
A. Forty years.

Q. I want to ask you, Mrs. Powloski, if you are connected with any organization in Biloxi?
A. The Seafood Workers Association.

Q. And the Gulf Seafood Workers Association?
A. Yes.

Q. That is a branch of the ladies association?
A. Sister organization.

Q. How long have you been a member of that organization?
A. Since its organization I have been a board of director and for the past twelve years I have been secretary and treasurer.

Q. You have been a Vice President before that time, and now you are secretary and treasurer; is that right?
A. Yes.

Q. Your duties are the same as any secretary of that type?
A. Yes.

Q. You were in the Court room and heard Mrs. Duvall, heard her testimony?

A. Yes.

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Q. You heard her testimony from start to finish?
A. Yes.

Q. Has she correctly stated the conditions under which members of your union work?
A. She has.

Q. Has she accurately given details as to the workers work and the manner of work and employment of your union in the factory?
A. Yes.

Q. Do you have occasion to go into the factories?
A. Yes, I do.

Q. Did you ever work in the factory?
A. Yes.

Q. You have worked in a factory?
A. Yes. Before I was secretary and treasurer I was a board of director and I was a floor walker. At that time Mr. Taultavaul operated the plant.

Q. The union and the factory work in harmony very well?
A. Never had any argument.

Q. I want to ask if there is anything that you know about this lawsuit with reference to the wages of employees, piece working employees. You care to state in any manner, of the desires in this case; have you got any information you care to give the Judge?

A. We would like to work like we did in the past, which has been the method of our grandmothers and grandfathers. In piece work you earn what you can, a scale of work set by the association and then brought to a meeting with the packers. We would like to work like we did in the past.

Q. May I ask you, do you have meetings of your organization and fix the price you receive, so much a pound for oysters and so much a pound for shrimp?

A. We do. We have special meets called, advertise

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for three days. It is brought before the members and brought before the body of packers.

Q. Would you say that what Mrs. Duvall testified to in her entire testimony is substantially what you would testify to if I would ask you what I asked her?

A. I would, if you asked me the same thing you asked her. Yes.

Cross-Examination.

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. In the pictures, which you have examined and which are before the Court as Plaintiffs Exhibits No. 1 to No. 4, and marked Files No. 1 to No. 4, showing separate processes of oysters and shrimp, and separate canning,

there appears to be among the workers quite a number of Negro or colored people?

A. Right.

Q. They are members of your union?

A. Yes.

Q. They receive the same fair treatment and wages as any other members of your union?

A. Right.

Q. They are, however, is it not a fact, ordinarily slower in their movements?

A. Yes.

Q. And more of them earn less than 75¢ an hour?

A. Yes.

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MRS. ROUMANIA A. FORD, one of the defendants, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Will you give us your name, please ma'am?

A. Roumania A. Ford.

Q. Where do you live?

A. Biloxi, Mississippi.

Q. You are one of the defendants in this case?

A. Yes.

Q. I want to ask you, Mrs. Ford, if you heard the president of your organization, Mrs. Duvall, and the secretary and treasurer of it, Mrs. Powloski, testify?

A. I did.

Q. Did you listen to every question I asked them and their answer?

A. I did.

Q. Did they correctly, truthfully, testify the facts?

A. They certainly did.

Q. Would you make any change in your testimony if I put you on the stand and asked you the same questions that I asked them?

A. I couldn't.

MRS. JOSEPHINE DONNELLEY, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. You are Mrs. Josephine Donnelley?

A. I am.

Q. And you live in Biloxi, Mississippi?

A. Yes.

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Q. Mrs. Donnelley, you are one of the defendants in this case?

A. Yes.

Q. You heard the questions that I asked Mrs. Duvall and Mrs. Powloski?

A. Right.

Q. Now, I want to ask if they have covered accurately and correctly the conditions where you work?

A. Yes.

Q. And the way people are paid for their work?
A. Right.

Q. Would you make any changes in their testimony if you were asked the same questions?
A. No.

Q. Do you have anything else you want to say?
A. No.

MRS. THERESA CLARK, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for the defendants:

Q. You are Mrs. Theresa Clark?
A. Yes.

Q. And you live in Biloxi?
A. Yes.

Q. Mrs. Clark, you are one of the defendants in this case, are you not?
A. Yes.

Q. You have heard the testimony here today?
A. Yes.

Q. You heard the president, Mrs. Duvall, and secretary and treasurer, Mrs. Powloski, of your organization testify?

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A. Yes.

Q. You heard all the questions I asked them?

A. Yes.

Q. And you heard their answers?
A. Yes.

Q. Now, I want to ask you if your president and secretary and treasurer correctly and truthfully answered the questions with reference to working conditions?
A. Yes.

Q. The conditions, the basis under which they are paid?
A. Yes.

Q. Would you answer them, would your answer to the questions asked them be the same as theirs?
A. Yes.

MRS. OLIVIA HAMMOND, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Please state your name?
A. Olivia Hammond.

Q. Mrs. Hammond, you are one of the defendants in this case?
A. Yes.

Q. I want to ask if you heard the president and the secretary of your organization testify here today?
A. Yes.

Q. You have been in the Court room all the time?

A. Yes.

Q. You heard all the questions asked them?

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A. Yes.

Q. And you heard all their answers?

A. Yes.

Q. I want to ask you if they have correctly and honestly detailed your working conditions?

A. They did, yes, sir.

Q. The members of your organization work in the factories at Biloxi?

A. Yes.

Q. You are familiar with the work?

A. I am.

Q. You have been working there for a long number of years?

A. For thirty-five years.

Q. Then you are familiar with all of it?

A. Yes.

Q. I want to ask if I put you on the stand and asked you all the questions that I asked your president, Mrs. Duvall, and your secretary and treasurer, Mrs. Powloski, would you answer them the same as they did?

A. The same as they did, yes.

Q. You wouldn't change it any?

A. No, sir.

The Defendants Rested.

By the Court:

Let me ask you, Mr. Adam, as I understand it these defendants are really demanding the minimum wage if they are covered by it?

By Mr. Adam, Counsel for Defendants:

Yes, we claim they come in under the wage and hour law.

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By the Court:

As I understand it, Mr. Adam, while there is much conflict in this testimony, you are demanding, insisting your clients are entitled to the minimum wage?

By Mr. Adam:

Yes. Under the law.

By the Court:

I find now, as a matter of law, the Court has jurisdiction, and that it is a detestable controversy between these parties, and as matter of fact there is a rather close question of law involved and one upon which I want thorough argument, and I am going to let you submit it by brief because there is no dispute upon the facts of the case. A lot of testimony has been introduced which is immaterial, for instance, the opinion of the litigants, some of them that it would be better for the factory and the union to be permitted to continue under the old scale, under the old system. That is entirely immaterial, for if they are covered by this act the Court will so hold. The only reason

I am requiring a brief is where your facts as detailed by witnesses on both sides and substantially admitted that these defendants are covered by the Act of Congress now to be construed. If they are covered by it then, of course, the bill would be dismissed and the declaration of law would be made that they are covered by it. Of course, if they are not covered by it then the Court would declare they are not covered by it, and the Court would issue injunction to prevent them proceeding by injunction. Bringing it down to a closer and more narrow point of law, the question for determination by the Court is whether the work is a part of the canning process of the business of these

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plaintiffs. If it is a part of the canning process, within the meaning of the act, then they are covered. If it is not a part of the canning process, under the act, then the act would not be as to them. That is all I can determine at this time. I should like to have instructive briefs. I will give the Plaintiffs fifteen days in which to file their brief, and give the Defendants fifteen days in which to reply thereto.

JUDGE'S FINDING OF FACT AND CONCLUSIONS OF LAW.

(Filed July 3, 1950)

(Title Omitted)

The Court finds the following facts in the above styled cause.

1. That the Plaintiffs are non residents of the State of Mississippi, being corporations organized under

and with their chief domicile in the State of Louisiana, but engaged in the operation of shrimp and oyster boats, shrimp and oyster packing plants, and shrimp and oyster canning plants in the City of Biloxi, Harrison County, Mississippi; and the Defendants, and all persons similarly situated, are residents of the State of Mississippi, being domiciled within the Southern Division of the Southern District of Mississippi.

2. That the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs, and there exists at the present time, as shown by the admissions

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in the answer, the evidence produced in the Court, and the admissions made in open Court, demands upon the part of the Defendants against the Plaintiffs which will exceed in the case of each Plaintiff the sum of $3,000; and that there further exists a justiciable controversy between the parties of which this Court has cognizance because of the amount involved, together with the fact that the suit is between residents of different states, and arises under a law of the United States of America.

3. It appears further from the evidence, both documentary and oral, admissions made in the pleadings and in open Court, that the City of Biloxi has, in the past been, and is now one of the chief centers of the shrimp and oyster industry in the United States of America, and that there is located in said city numerous oyster and shrimp processing plants and factories, some of which are engaged in processing shrimp and oysters raw for the purpose of being sold other than in hermetically sealed cans, as well as in some instances processing them for the pur-

pose later of canning the same within the meaning of canning as hereinafter construed by the Court.

It appears and I so find that each of the Plaintiffs own separate plants at Biloxi, Mississippi, and that their operation, including the taking and harvesting of shrimp, being shell fish and crustacea, including the going to and returning from the oyster beds and shrimp grounds, including the employment by the Plaintiffs of the Defendants in the loading, unloading, packing or processing of oysters and shrimp, and that during the period complained of in the complaint, that is on and prior to the first day of March, 1950, and for years theretofore, the Defendants were casual

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workers of the Plaintiffs and were engaged in one of the operations of processes by which shrimp and oysters are processed so that they might theerafter be in a condition under which the same could be shipped raw, cooked or canned.

The evidence further shows, and I so find, that the acts leading up to the actual process of canning are as follows:

A. In the case of shrimp,—trawlers, that is motorboats driven by internal combustion engines, and having a net tonnage of from one to twenty tons, which vessels are equipped with a seine, commonly called a trawl, which by means of boards called otterboards, weights, and floats, would extend in the rear of said vessel for approximately sixty feet in width, and eight or ten feet in depth, and being propelled by the power of said vessel, would engage in the bag of said trawl or seine, edible shrimp which are cap-

tured by means of the seine or trawl being moved upward to the rear deck of the vessel through the operation of a power winch, and after being placed in the hold of said vessel, together with sufficient ice to preserve the same, until by the power of the vessel itself, or upon being loaded onto another vessel, the said shrimp are brought to the wharf of the company's plant in Biloxi, these shrimp being involved with crushed ice, would be shoveled onto a conveyor that would elevate the same for about ten or twelve feet, from which the said shrimp, together with the ice content, would be discharged into a tin trough filled with water, and by force of the water and gravity, the shrimp proceeds along this trough for a certain distance until they are dumped into a tank, which performs

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two functions: first, washes the shrimp, and second, separates the shrimp from the ice and then the separated shrimp by means of a second trough where for a certain number of feet, the same by force of gravity, are conveyed past an inspector, who inspects and removes all shrimp considered unfit for commercial use, until finally the shrimp are discharged into baskets, which baskets are then carried to tables and the shrimp placed upon the tables, on each side of which are located the Defendants and persons similarly situated, who then engage in the process of either removing the heads of the shrimp, or of removing the heads and peeling off the skin of the shrimp. When the heads are removed from the shrimp but not peeled, the shrimp are then placed in a waterbourne conveyor which carries them into another room, where they are weighed and placed in five pound containers and prepared for quick freezing and shipment in interstate commerce.

In other cases, depending upon the size and quality of the shrimp, the shrimp are placed in a different trough and carried into a different room, in which room they are graded, either for the purpose of being placed in friction top cans and preserved with ice, or are moved into a further process which includes salting, weighing, capping, canning, hermetically sealing, pasteurizing, labelling and boxing the shrimp for shipment in interstate commerce, the use to which the shrimp are put being dependent upon their size, grade and quality, and when the shrimp are first taken from the boat and carried to the processing room where they are peeled or beheaded, neither the pickers nor the plant at that time know whether or not the shrimp are going to be used for canning or for sale in some other form. If the shrimp are used in some other form, such as being packed in boxes and quick frozen, or are placed

in large containers with friction top seal where protected by ice ,they are shipped to different parts of the country in intertsate commerce.

It would appear from the evidence and the admissions that the original process is separate and distinct and has no immediate relationship to the after use of the shrimp, that is whether they are used for canning, freezing or cooked and peeled.

B. In the case of oysters, boats of the same type as engaged in catching shrimp, are sent to the oyster grounds of Louisiana and Mississippi and there by means of dredges suspended from each side of the boat, enclose or capture oysters which are brought to the deck of the vessel, placed in the hold of the vessel, and by means of the

vessel itself, transported to Biloxi, where at the wharf of the company by means of power hoists, the oysters in containers are raised above the level of the wharf, and there are placed into a funnel-like contrivance which discharges the same into a revolving drum, into which water is constantly pouring, resulting in the washing from the oysters a great part of the dirt accumulated on the bottom of the sea, and preparing the oysters for the next step; and from this washing machine automatically the oysters are placed in cars approximately eight feet long and three feet wide which cars are pushed along a small track into a large iron box, capable of accomodating three or four cars of oysters and commonly called a steam box, where the oysters are subjected to about ten pounds of steam and about 250° Farenheit, which results: first in completely opening their shells and second, in cooking the meat of the oysters so that it is then and there edible and

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useful for human consumption, and after being removed from the shell can and sometimes is carried many miles to a point of canning often in a different state. From this steam box, the cars are pushed along tracks into a shucking shed, where the defendants and similarly situated persons, by means of small knives, called oyster knives, remove the meat from the oysters, place it in cans, and when five pounds of meat is obtained, take these to a window leading into a cannery of the plant, and there the meat is weighed, and the shuckers, that is the Defendants and persons similarly situated, are paid at the rate of approximately 18¢ per pound for the shucked meat.

4. It further appears, and I so find, that both in the operation of the shrimp boats and the oyster boats,

some of which are owned by the Plaintiffs and others owned by private individuals, the boats are operated by a captain and crew, under a partnership, or joint adventure arrangement, with the Plaintiffs' companies, by which the captain and crew have absolute control of their destination, their hours and manner of work, and to whom they sell the catch, provided, however, that the catch is always sold to the Plaintiffs if they have a boat present or are willing to pay the market price, but if the market price is not paid, or for any other justifiable reason, the captain may sell the catch to a third person.

When the shrimp are brought to the company, the company pays the captain and crew for the shrimp; but, in the case of oysters, the catch is paid for by the number of pounds of oyster meat yielded by the catch and, therefore, the title to the oyster meat does not pass to the company until the first process performed

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by the Defendants is completed, and at any time during this process, if the captain and crew are unsatisfied with the yield or the price, the oysters can be sent to another plant for working. If the oysters are bought by the company, and become the property of the company, that is the Plaintiffs in this case, they are then either sold to some other company for canning or if they are to be canned by the same company, are dumped into a trough which carries them through a washing machine and saline bath, by means of which all foreign matter is deposited at the bottom of the bath, and the oysters float into a receptacle from which they are taken and placed upon tables, and from these tables cans are filled by persons other than

workers of the class who are made Defendants in this case. The cans are then weighed, filled with salt water, placed upon a belt, and carried to a capping machine. The cans are then hermetically sealed, then placed in large round baskets and deposited in a processing kettle, where they are further pasteurized by means of steam for 14 minutes at 230° Farenheit. Later these cans are cooled by water, labels are placed thereon, and the cans placed in boxes and then stored or shipped in interstate commerce.

I find from the evidence and admissions that the Defendants and persons similarly situated, are engaged in a process involving shrimp and oysters which is separate, distinct and unrelated to any future process necessary for the salability or shipment in interstate commerce; that this process is a distinct and intricate process by which they become merchantable food and salable in that form, prior to any process needed or required in canning. It appears from the evidence that in the case of oysters a long, distinct

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and intricate process is carried on from the time the oysters are removed from the boat until they are sold by the crew and captain at the window where they then become the property of the purchaser and can be canned at the plant or sent to some other plant, or sold to some other person for canning. The evidence and admissions show that practically the same initial process is carried on, has been used for 50 or 60 years, and that during that time it has been a common practice to ship these oysters to be canned in other states or for one factory to can the processed meat of another factory, so that when the oysters are finally sold to the factory, by means of the

efforts of the Defendants, and others similarly situated, they have completed an initialed or original process, separate and apart from canning.

In the case of shrimp, it would appear that neither the crew, pickers, or factory owners know of the purposes for which the shrimp are finally intended; that this depends upon their being cleaned and graded, and that a large percentage of the shrimp are afterwards shipped in friction top cans, protected by ice, or frozen with their skins on, and only a limited percentage ever go into canning. And it further appears from the evidence by way of admission and by way of documents, that the initial process of picking, beheading, washing from the time they arrive by boat until they are ready for some of the three processes mentioned herein, is a separate and distinct process, not necessarily related to canning.

It further appears from the evidence, the pleadings and the admissions, that each of the Plaintiffs employs about 200 laborers, about 40% of whom earn between 40 and 50¢ per hour, about 40% earn between

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50 and 75¢ per hour, with the balance being able to earn from $1.00 to $1.50 per hour, and the ages of these persons range from 18 years to 70 or 75 years of age, and the earnings are influenced both by natural skill and aptitude of the worker as well as their age, in the performance in removing the shrimp and oysters from the hulls.

The Court, therefore, finds as a matter of fact that the Defendants are engaged in the processings of seafood (other than canning).

CONCLUSIONS OF LAW FROM THE ABOVE FACTS.

The Court finds the law on the above facts as follows:

That the Plaintiffs, both of them, under the above facts, employ the Defendants, and those workers similarly situated, in work involving the processing of aquatic matter (other than canning), and the Plaintiffs, therefore, are exempt from any obligation to the employees, or to other persons similarly situated, under Sections 206 and 207, Title 29 U.S.C.A., being Sections 6 and 7, 52 Stat. 1062 and 1063, as amended, such persons being specifically exempted from the provisions of the Wage and Hour Law, being Section 213, Title 29 U.S.C.A., as amended, such persons being specifically exempted from the provisions of the Wage and Hour Law, being Section 213, Title 29, U.S.C.A., as amended, being Section 11 C. 736-63, Stat. 917, which section exempts all persons engaged in the taking, harvesting, cultivating, farming, loading, unloading, packing, marketing, freezing, curing, storing, or distribution of aquatic products in interstate commerce except for canning.

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In arriving at its conclusion of law, the Court has considered among others, the following authorities:

Section 13 of the Wage and Hour Law, being Section 11 C. 736, 63 Stat. 917, being Section 213, Title 29 U.S.C.A., as amended.

Wala v. Humphries, 133 F. (2d) 193.

McComb v. Consolidated Canning Company, 174 F. (2d) 74, Definition of word Can in Century Dictionary as follows:

Can: To put into a can; especially, to put into sealed metal cans or glass jars, for preservation, as prepared vegetables, fruits and meats.

Definition of word Canning, 12 Corpus Juris Secundum, page 892.

Henry v. Markeston State Bank, 68 F. (2d) 554, 557.

State v. Pacific American Fisheries, 131 p. 452, 454. 73 Wash. 37.

This the 3rd day of July, A. D., 1950.

(S.) S. C. MIZE,
Judge.